IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

McNABB COAL COMPANY, INC.,

Plaintiff,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Defendants.

Civil Action

No. 88-C-281-E
No. 88-C-1525-E
(Consolidated)

ORDER

This matter came on for hearing upon the motion by the Secretary of the Interior for the court to reinstate an injunction against mining by McNabb Coal Company, Inc. until McNabb comes into compliance with the Settlement Agreement, as amended, which was first approved by the court November 2, 1990. The settlement provides a schedule of activities to bring McNabb into compliance with the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 et seq.

Upon hearing the arguments of counsel, the court finds that McNabb concedes that it has not reclaimed or re-permitted and bonded 2/7 of the pit system that existed in October 1990, and also finds that 2/7 of the pit system should have been reclaimed or permitted and bonded by November 1993. McNabb has not completed an application for a new permit although three years have passed since the settlement was reached.

The Court finds that the reinstatement of the permanent

injunction should be denied at this point, but that McNabb must complete its permit application and obtain bond satisfactory to the government by April 1, 1994, or the pernanent injunction will be reinstated.

IT IS HEREBY ORDERED:

1. That the Secretary's motion for an immediate injunction is DENIED;

2. That McNabb shall revise its permit application and obtain bond satisfactory to the government by April 1, 1994; and

3. That this matter is set for further hearing on Thursday, April 14, 1994, at 9:30 a.m., to determine whether McNabb shall have complied with the aforestated Order and, if not, whether a preliminary or permanent injunction shall be issued.

JAMES O. ELLISON
CHIEF JUDGE

Prepared by:

STEPHEN C. LEWIS
United States Attorney

By: Phil Pinnell
Phil Pinnell
Assistant U.S. Attorney

Of Counsel:
Gerald A. Thornton, Attorney
Office of the Field Solicitor
U.S. Department of the Interior
P.O. Box 15006
Knoxville, TN
(615) 545-4303

Approved as to form by:

Kenneth Underwood
Counsel for McNabb Coal Co., Inc.
525 S. Main Street, Suite 680
Tulsa, Oklahoma 74103
(918) 582-7447

Richard Lowry or Tom McGeady
Counsel for Intervenors
Logan & Lowry
101 South Wilson
Vinita, Oklahoma 74301-0558
(918) 256-7511

GAT\MCNABB\ORDER

Prepared by:

STEPHEN C. LEWIS
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(918) 256-7511

GAT\MCNABB\ORDER

(8-35) IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LONNIE HENRY, Plaintiff,	)	
vs.	)	Case No. 89-C-579-E
ALAN BIRD, an individual, and DEWEY JOHNSON, individually and as the Sheriff of Rogers County, Defendant.	)	

JUDGMENT

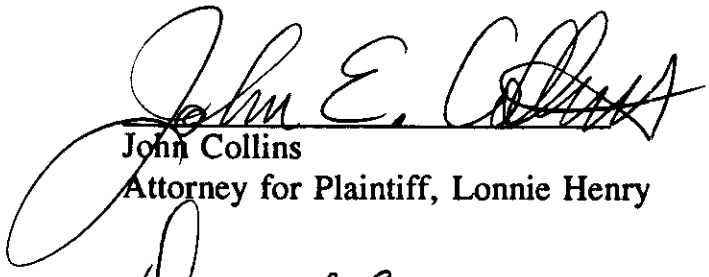
This action came on for trial before this Court and a jury, Honorable James O. Ellison, presiding on December 9, 1993. The jury heard the evidence, the argument of counsel and the instructions of the Court and returned its verdict in favor of the Defendants Alan Bird and Dewey Johnson on December 15, 1993.

In accordance with the verdict of the jury, judgment is entered in favor of the Defendants Alan Bird and Dewey Johnson and against the Plaintiff.

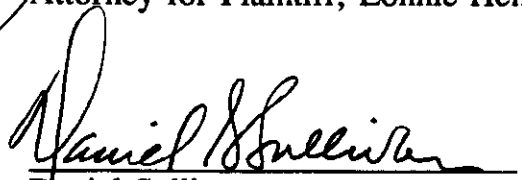
S/ JAMES O. ELLISON

HONORABLE JAMES O. ELLISON
United States District Judge

APPROVED AS TO FORM:



John Collins
Attorney for Plaintiff, Lonnie Henry



Daniel Sullivan
Attorney for Defendants Alan Bird
and Dewey Johnson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANNY MEYERS,
Plaintiff,

v.

HAYSSEN MANUFACTURING CO.,
a Corporation,
Defendant.

93-C-141-B
Case No.

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 28 day of December, 1993, upon presentation of the Joint Stipulation for Dismissal Without Prejudice executed by the Plaintiff Danny Meyers and the Defendant Hayssen Manufacturing Co., the Court finds and adjudges that all claims of the Plaintiff Danny Meyers set forth herein against the Defendant Hayssen Manufacturing Company should be and are hereby dismissed without prejudice to any future action upon such claims, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Judge Thomas R. Brett

Approved as to form and content:

Gary A. Eaton, Attorney for the
Plaintiff Danny Meyers

Nancy J. Siegel, Attorney for the
Defendant Hayssen Manufacturing Company

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL NORRIS,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-108-B
93-C 169-B

ORDER

Before the Court is Defendants' motion to dismiss filed on July 7, 1993. Plaintiff has not responded.

On November 11, 1993, the Court ordered Defendants to re-mail a copy of their motion to Plaintiff at his most recent address, and notify the court if they were unable to complete service of the motion on Plaintiff. Neither party has notified the Court or filed any pleadings since November 11, 1993.

The Court will, thus, grant Defendants' motion to dismiss. Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss [docket #9] is **granted** and the above captioned case is **dismissed.**

SO ORDERED THIS 22nd day of Dec, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

13/14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL NORRIS,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 93-C-108-B
93-C 169-B

ORDER

Before the Court is Defendants' motion to dismiss filed on July 7, 1993. Plaintiff has not responded.

On November 11, 1993, the Court ordered Defendants to re-mail a copy of their motion to Plaintiff at his most recent address, and notify the court if they were unable to complete service of the motion on Plaintiff. Neither party has notified the Court or filed any pleadings since November 11, 1993.

The Court will, thus, grant Defendants' motion to dismiss. Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss [docket #9] is **granted** and the above captioned case is **dismissed.**

SO ORDERED THIS 22nd day of Dec, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

13 14

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JERRY W. SUMMERS; NANCY M. SUMMERS aka NANCY SUMMERS aka NANCY M. HODGE; LINDA G. HOLDER, Tenant; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	CIVIL ACTION NO. 93-C-780-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of December, 1993. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, **Jerry W. Summers, Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge, and Linda G. Holder, Tenant**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, **Jerry W. Summers and Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge**, were served with Summons and Complaint on October 13, 1993; that the Defendant, **Linda G. Holder, Tenant**, acknowledged receipt of

Summons and Complaint on September 11, 1993; that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on August 31, 1993; and that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, acknowledged receipt of Summons and Complaint on September 1, 1993.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on September 28, 1993; that the Defendants, **Jerry W. Summers, Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge, and Linda G. Holder, Tenant**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 17, 1990, Jerry W. Summers and Nancy M. Summers aka Nancy M. Hodge filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 90-2373-C. On December 26, 1990, a Discharge of Debtor was entered discharging debtors from all dischargeable debts. Subsequently, Case No. 90-2373-C, United States Bankruptcy Court for the Northern District of Oklahoma, was closed on May 15, 1991.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages securing said promissory notes upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block One (1), GREEN ACRES OF GLENPOOL, an Addition in the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 13, 1983, Co Thi Le executed and delivered to the United States of America, acting through the Farmers Home Administration, a promissory note in the amount of $39,500.00, payable in monthly installments, with interest thereon at the rate of 10.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Co Thi Le executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated October 13, 1983, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on October 13, 1983, in Book 4735, Page 905, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 28, 1990, Jerry W. Summers and Nancy M. Summers executed and delivered to the United States of America, acting through the Farmers Home Administration, an Assumption Agreement assuming liability for the unpaid amount on the above-described note and mortgage in the amount of $33,138.94, payable in monthly installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that on June 28, 1990, Jerry W. Summers and Nancy M. Summers executed and delivered to the United States of America, acting through the Farmers Home Administration, a promissory note in the amount of $410.00, payable in monthly

installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that as security for the payment of the above-described assumption agreement and note, Jerry W. Summers and Nancy M. Summers executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated June 28, 1990, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 28, 1990, in Book 5261, Page 2237, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 28, 1990, Jerry W. Summers and Nancy M. Summers executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note, assumption agreement, and mortgage was reduced.

The Court further finds that on March 22, 1991, Jerry W. Summers and Nancy Summers executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note, assumption agreement, and mortgage was reduced.

The Court further finds that the Defendants, **Jerry W. Summers and Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge**, made default under the terms of the aforesaid notes, assumption agreement, mortgages, and interest credit agreeements by reason of their failure to make the monthly installments due thereon, which

default has continued, and that by reason thereof the Defendants, **Jerry W. Summers and Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge**, are indebted to the Plaintiff in the principal sum of $35,533.99, plus accrued interest in the amount of $5,492.87 as of June 18, 1993, plus interest accruing thereafter at the rate of 8.75 percent per annum or $8.5185 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $3,852.00, plus interest on that sum at the legal rate from judgment until paid, and the costs of this action in the amount of $29.36 (fees for service of Summons and Complaint).

The Court further finds that the Defendant, **Linda G. Holder, Tenant**, is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment **in rem** against the Defendants, **Jerry W. Summers and Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge**, in the principal sum of $35,533.99, plus accrued interest in the amount of $5,492.87 as of June 18, 1993, plus interest accruing thereafter at the rate of 8.75 percent per annum or $8.5185 per day until judgment, plus interest thereafter at the current legal rate of 3.61 percent per annum until fully

paid, and the further sum due and owing under the interest credit agreements of $3,852.00, plus interest on that sum at the current legal rate of 3.61 percent per annum from judgment until paid, plus the costs of this action in the amount of $29.36 (fees for service of Summons and Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Linda G. Holder, Tenant, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Jerry W. Summers and Nancy M. Summers aka Nancy Summers aka Nancy M. Hodge**, to satisfy the **in rem** judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7159
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-780-E

PP:css

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,

Plaintiff,

-vs.-

LOUIS J. BRESSMAN;
BETTY J. BRESSMAN;
TULSA ADJUSTMENT BUREAU, INC., a corporation;
OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION, a corporation d/b/a OKLAHOMA OSTEOPATHIC HOSPITAL;
THE STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION;
CITY OF BROKEN ARROW, a municipal corporation;
COUNTY TREASURER, Tulsa County, Oklahoma; and
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma;

Defendants.

CASE NO. 93-C-391E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27th day of December, 1993. The plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, Tulsa Adjustment Bureau, Inc., appears not, having previously disclaimed any interest herein; the defendant, Osteopathic Hospital Founders Association, appears by Mark G. Robb; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission appears by Kim D. Ashley, Assistant General Counsel; the defendant, City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City

Attorney; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney; the defendant, Louis J. Bressman, appears not, but makes default; and the defendant, Betty J. Bressman, appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Louis J. Bressman**, acknowledged receipt of summons and complaint on May 17, 1993, but has failed to otherwise appear and is now in default;

(b) the defendant, **Betty J. Bressman**, acknowledged receipt of summons and complaint on May 17, 1993, but has failed to otherwise appear and is now in default;

(c) All other defendants, namely **Tulsa Adjustment Bureau, Inc.; Osteopathic Hospital Founders Association; The State of Oklahoma, ex rel. Oklahoma Tax Commission; City of Broken Arrow, Oklahoma; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers in this action and have approved the form of this judgment as evidenced by their attorney's subscription, with the exception of Tulsa Adjustment Bureau which has disclaimed any interest in or to the Property.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and

venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On October 24, 1980, James Kevin Turner and Anne Elizabeth Turner, husband and wife, executed and delivered to Liberty Mortgage Company, a mortgage note in the amount of $57,250.00, payable in monthly installments, with interest thereon at the rate of Thirteen and One-half (13.50%) percent per annum.

4. As security for the payment of the above described mortgage note, James Kevin Turner and Anne Elizabeth Turner, husband and wife, executed and delivered to Liberty Mortgage Company, a mortgage dated October 24, 1980, covering the following described property:

> Lot Nine (9), Block Two (2), VALLEY RIDGE, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk November 3, 1980, in book 1508 at page 289. The mortgage tax due thereon was paid.

5. (a) On November 24, 1980, Liberty Mortgage Company assigned the mortgage note and the mortgage securing it to The New York Guardian Mortgagee Corp., its successors and assigns by an instrument recorded with the Tulsa County Clerk December 1, 1980, in book 4513 at page 1713.

(b) On April 30, 1985, The New York Guardian Mortgagee Corp. assigned the mortgage note and the mortgage securing it to Equitable Mortgage Resources Inc., by an instrument recorded with the Tulsa County Clerk September 30, 1985, in book 4895 at page 1019.

(c) On August 18, 1989, TARI, Inc., f/n/a (sic) Trust America Resources, Inc. f/k/a Equitable Mortgage Resources, Inc. assigned the mortgage note and the mortgage securing it to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns by an instrument recorded with the Tulsa County Clerk August 23, 1989, in book 5202 at page 2013.

6. On August 29, 1988, Warren James Ramey and Joyce Irene Ramey, husband and wife then the owners of fee simple title to the Property via mesne conveyances, granted a general warranty deed to the defendants, Louis J. Bressman and Betty J. Bressman. This deed was recorded with the Tulsa County Clerk August 31, 1988, in book 5125 at page 308, and the defendants, Louis J. Bressman and Betty J. Bressman assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

7. On September 1, 1989, the defendants, Louis J. Bressman and Betty J. Bressman, husband and wife, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose.

Superseding agreements were reached September 1, 1990; April 1, 1991; November 1, 1991; February 1, 1992; and July 1, 1992.

8. The defendants, Louis J. Bressman and Betty J. Bressman, have defaulted under the terms of the note, mortgage and forbearance agreements due to their failure to pay installments when due. Because of such default, the defendants, Louis J. Bressman and Betty J. Bressman, are indebted to the plaintiff in the amount of $91, 036.64, plus interest at the rate of thirteen and one-half (13.5%) percent per annum from April 29, 1993, until the date of this judgment, plus interest thereafter at the legal rate until fully paid; plus the costs of this action in the amount of $256.00 for abstracting and $8.00 for recording the Notice of Lis Pendens.

9. The defendant, Tulsa Adjustment Bureau, Inc., claims no right, title or interest in or to the Property.

10. The defendant, Osteopathic Hospital Founders Association, n/k/a Tulsa Regional Medical Center, claims an interest in the Property by virtue of a Journal Entry of Judgment in Tulsa County District Court Case Number CS-88-1956, dated July 28, 1988, and filed with the Tulsa County Clerk August 3, 1988, in book 5119 at page 935.

11. The defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, claims an interest in the Property by virtue of tax warrants representing unpaid income tax in the amount of $650.06, plus penalties and interest.

12. The United States Treasury Department, Internal Revenue Service claims some right, title, or interest in the Property by virtue of the following:

(a) a federal tax lien serial number 51519 dated May 30, 1985, and recorded with the Tulsa County Clerk June 10, 1985, in book 4868 at page 871, in the amount of $4,561.41.

(b) a federal tax lien serial number 83809 dated June 19, 1987, and recorded with the Tulsa County Clerk June 29, 1987, in book 5035 at page 655, in the amount of $3,375.17.

(c) a federal tax lien serial number 738901435 dated March 27, 1989, and recorded with the Tulsa County Clerk March 31, 1989, in book 5175 at page 292, in the amount of $3,600.85.

(d) a federal tax lien serial number 739007886 dated May 24, 1990, and recorded with the Tulsa County Clerk June 4, 1990, in book 5256 at page 2089, in the amount of $1,455.85.

(e) a federal tax lien serial number 739011717 dated August 6, 1990, and recorded with the Tulsa County Clerk August 13, 1990, in book 5270 at page 1462, in the amount of $785.59.

(f) a federal tax lien serial number 739115158 dated May 27, 1991, and recorded with the Tulsa County Clerk

June 5, 1991, in book 5326 at page 174, in the amount of $5,279.72.

(g) a federal tax lien serial number 739115821 dated June 3, 1991, and recorded with the Tulsa County Clerk June 11, 1991, in book 5327 at page 1577, in the amount of $1,516.19.

Inasmuch as government policy prohibits the joining of another federal agency as a party-defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies, the lien shall be deemed released at the time of sale should the Property fail to yield an amount in excess of the debt to the plaintiff.

13. The defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the Property except insofar as it is the holder of certain easements as shown on the duly recorded plat of VALLEY RIDGE addition.

14. The defendant, County Treasurer, Tulsa County, Oklahoma, claims an interest in the Property by virtue of personal property taxes for the following tax years: 1991, indexed under number 91-03-2884050, in the amount of $27.00; and 1992, indexed under number 92-03-2887840, in the amount of $28.00.

15. The defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

16. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED that the plaintiff have and recover judgment against the defendants, Louis J. Bressman and Betty J. Bressman, in the principal sum of $91, 036.64, plus interest at the rate of thirteen and one-half (13.5%) percent per annum from April 29, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of $264.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the plaintiff for taxes, insurance, abstracting, or sums for the preservation of the Property.

IT IS FURTHER ORDERED that the defendant, Tulsa Adjustment Bureau, Inc., has no right, title or interest in the Property.

IT IS FURTHER ORDERED that the defendant, Osteopathic Hospital Founders Association have and recover judgment in the amount of $7,226.70, plus a reasonable attorney's fee of $1,400.00 plus costs and interest.

IT IS FURTHER ORDERED that the defendant, State of Oklahoma, ex rel., Oklahoma Tax Commission, have and recover judgment in the amount of $650.06, plus penalties and interest.

IT IS FURTHER ORDERED that the United States Treasury Department, Internal Revenue Service, have and recover judgment in the amount of $20,574.78.

IT IS FURTHER ORDERED that the defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the Property, except insofar as it is the holder of certain easements as shown on the duly recorded plat of Valley Ridge addition.

IT IS FURTHER ORDERED that the defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $55.00, plus penalties and interest.

IT IS FURTHER ORDERED that the defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in or to the Property.

IT IS FURTHER ORDERED that upon the failure of the defendants, Louis J. Bressman and Betty J. Bressman, to satisfy the money judgment of the plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to the plaintiff's election with or without appraisement and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

Second:

In payment of the judgment rendered herein in favor of the plaintiff;

Third:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

S/ JAMES O. ELLISON

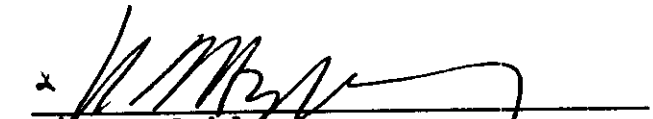
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS,
United States Attorney

Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Mark G. Robb
Tulsa Regional Medical Center
formerly, Oklahoma Osteopathic Hospital



Kim D. Ashley
Assistant General Counsel
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Michael R. Vanderburg
City Attorney
City of Broken Arrow, Oklahoma

J. Dennis Semler
Assistant District Attorney
Tulsa County, Oklahoma

APPROVED:

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United States Attorney

Mikel K. Anderson
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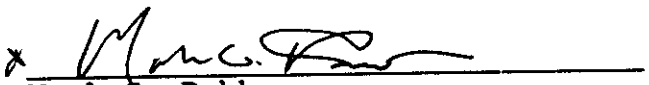

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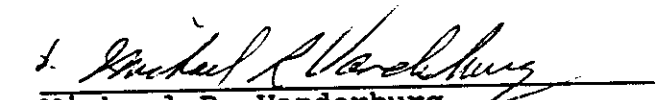

Michael R. Vanderburg
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J. Dennis Semler
Assistant District Attorney
Tulsa County, Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN K. WILLIS, MAX RESTAURANT & CLUB, INC., and LEISURE MANAGEMENT CORPORATION,	)	
Plaintiffs,	)	
vs.	)	Case No. 93-C-569-E
THE CITY OF TULSA,	)	
Defendant.	)	

ORDER DISMISSING WITHOUT PREJUDICE

NOW on this 27th day of December, 1993, the above-styled cause of action comes before this Court on Plaintiffs' Motion to Dismiss Without Prejudice. The Court finds that good cause has been shown and the relief should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled cause of action will be dismissed **without prejudice**.

JUDGE JAMES O. ELLISON

6638001.016-28

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL FARMER,

Petitioner,

vs.

MICHEAL CARR, et al.,

Respondent.

No. 93-C-734-E

ORDER

Before the Court are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response, and Petitioner's reply.

Petitioner is presently incarcerated pursuant to a conviction for Lewd Molestation and Obtaining Money by False Pretenses in the District Court of Tulsa County in Case Nos. CRF-87-688, CRF-85-4207, and CRF-87-189.

On August 2, 1993, Petitioner filed this instant petition raising constitutional challenges to the 1988 amendments to Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the earned-time-credit statute). Petitioner asserted (1) that the amended version of sections 138 and 224 was an ex post facto law; (2) that the amended version of section 138 which deleted the opportunity to earn credits for blood donations was an ex post facto law; (3) that the benefits of the pre-amended version of section 224 were available to a selected number of inmates; and (4) that Petitioner was entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute. Petitioner sought the maximum benefits of the pre-amended version of section 224 and "all

the additional credits he ha[d] thus far accumulated under 57 O.S. (1991) § 138," the amended version.

I. BACKGROUND

A. Statutory Provisions

At the time of Petitioner's convictions, the DOC awarded each inmate credits according to the type of job or activity he was engaged in. Every inmate who worked or attended school earned one-credit day for each day he engaged in such activity. Okla. Stat. tit. 57, § 138(A) (Supp. 1985). Every inmate who worked for the Oklahoma State Industries, Private Prison Industries, or Agricultural Production or satisfactorily participated in a vocational training program earned two-credit days for each day he engaged in such activity. Id. § 138(B). Every inmate who instead worked for a state, county, or municipality earned three-credit days for each day he worked. Okla. Stat. tit. 57, § 224(A) (1981).

In addition to these earned time credits, an inmate was entitled to a deduction of twenty days for each pint of blood he donated to the American Red Cross or to any approved agency or hospital. Okla. Stat. tit. 57, § 138(B) (1981). However, no inmate could receive credit for more than four donations in any twelve-month period. Id. The statute further provided that blood-time credits could not be revoked by the Department of Corrections or any of its delegated authorities. Id.

Effective November 1, 1988, the Oklahoma Legislature amended section 138 so that "[e]very inmate . . . shall have their term of

imprisonment reduced monthly, based upon" the assignment to one of four class levels. Okla. Stat. tit. 57, § 138(A) (Supp. 1988). Under this system, possible credits range from zero per month (Class 1) to 44 per month (Class 4). Id. § 138(C)(2). Educational achievement and completion of departmentally approved programs also entitle an inmate to earn credits, but in no case more than ninety credits per calendar year. Id. § 138(F). Section 224, amended at the same time, also displaces the set credits for work assignments with a state, county, or municipality, and instead, references section 138 for calculations of those credits. Okla. Stat. tit. 57, § 224(A) (Supp. 1988). The 1988 amendments further provided that as of November 1, 1988, "all inmates currently under the custody of the Department of Corrections shall receive their assignments and all credits from that date forward shall be calculated pursuant to this act." Id. § 138(H) (Supp. 1988).

B. Case Law and DOC's Response

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), abrogated on other grounds, Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals found that:

> [A]fter a comparison of the statutes, before and after the amendment, it is obvious that 57 O.S. Supp. 1988, §§ 138 and 224 are disadvantageous to petitioner and other similarly situated prisoners. On its face, the amended statute adds requirements and reduces the number of monthly earned credits available to an inmate who abides by prison rules and adequately performs his or her assigned tasks. By definition, this reduction lengthens the period that someone in petitioner's position must spend in prison. Thus, the amended statute constricts an

> inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result simply runs afoul of the prohibition against ex post facto laws.

The court then held that inmates "who are disadvantaged by the amended statute, shall be entitled to the credits allotted under the statute effective on the date their crime was committed." Id.

In State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. 1990), the Oklahoma Court of Criminal Appeals clarified its holding in Ekstrand by stating that an inmate was not entitled to benefits under both the original (1981) and amended (1988) statutes, but was entitled only to credits allotted under the statute effective on the date the crime was committed.

Following the Ekstrand opinion, the DOC implemented a procedure whereby all inmates received credits on a monthly basis under the amended version. If an inmate believed he had been disadvantaged by application of the credit under the amended version, he could apply for the additional credits he would have received under the old version. The DOC, however, did not award the pre-1988 credits until thirty days before discharge, and required the inmates to keep track of their pre-1988 credits. The DOC had apparently misinterpreted the Ekstrand holding to mean that a sentence could not be reduced by the pre-November 1, 1988 credits until the prisoner was entitled to immediate discharge.

In April 1993, the Eastern District of Oklahoma held that the amended version of sections 138 and 224 was ex post facto as applied to inmates whose crimes were committed before November 1, 1988, and thus, that inmates with pre-1988 crimes were entitled to

credits only under the pre-1988 statute. The court held that the amended version was so dissimilar to the pre-existing statute that the statutes could not be compared. The court further held that it was not clear that the Oklahoma legislature had intended to make available credits under the amended version to inmates whose crimes were committed before November 1, 1988. Lastly, the Court held that the DOC should provide each inmate a monthly computation of the pre-November 1, 1988 credits. Scales v. Reynolds, CIV-90-369-S and CIV-90-375-S, Order (adopting Report and Recommendation) (E.D. Okla. Apr. 7, 1993).

Following the Scales opinion, the DOC developed a new procedure for the monthly comparison and award of credits. Although all inmates still receive credits under the amended-credit statute, the DOC now makes a month-end comparison of the number of credits an inmate (who is incarcerated for a crime pre-dating the 1988 amendment) received under the amended statute and the number of credits he would have received under the pre-amended statute. If the credits under the pre-amended statute exceed those under the amended statute, the inmate's sentence is reduced according to the number of credits under the pre-amended statute for that month. If, on the other hand, the credits under the amended statute exceed those under the pre-amended statute, the inmate's sentence is reduced according to the number of credits under the amended statute for that month. The DOC then provides each inmate a

monthly print-out showing the total credits received.[1]

II. DISCUSSION

A. Work Credits

In his first two grounds for relief, Petitioner contends that the amended version of sections 138 and 224 is ex post facto as applied to him, and thus, that the DOC should calculate his earned-time credits under the pre-amended version of sections 138 and 224.

Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be subject of an ex post facto violation. If the credits under the old system exceed those under the new system, the Petitioner's sentence is reduced in accordance with the number of credits received under the old system for that month. If, on the other hand, credits under the new system are more advantageous, the new system is applied that month.

Petitioner replies that the "DOC is still attempting to compare both systems prior to granting monthly credits in direct contravention of the court's order [in] Scales." (Docket #8 at 1.)

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). As noted above,

---

[1]To implement this new policy, the DOC made a lump sum award in August 1993, of those credits which prior to that date had been carried on DOC's records but had not yet been awarded to eligible inmates pursuant to DOC's previous policy.

the DOC has implemented a procedure whereby the Petitioner's circumstances are evaluated on a monthly basis, and the Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that the Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation.

Petitioner's contention that the DOC is improperly comparing the two systems is immaterial in this case. This Court is not bound by the holding in Scales that the pre-amended and amended versions of the earned-time-credit statute cannot be compared. Accordingly, the Court concludes the Petitioner is not entitled to relief on his first two grounds.

B. Blood Credits

In his third ground for relief, Petitioner asserts that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto alteration of the length of his imprisonment. In the alternative, Petitioner asserts that the pre-amended statute created a liberty interest in the opportunity to earn credits for blood donations.

Respondent states that, because the blood donation program was suspended long before the Petitioner was convicted due to the lack of qualified organizations that were willing to accept prisoners' donated blood, the elimination of blood donation credits does not amount to an ex post facto violation. Respondent further argues that the deletion of the blood donation program rests within the

discretion of prison officials, and that the DOC should not be forced to collect blood from inmates when the donees refuse to accept it.

Although Petitioner does not dispute that the Red Cross and other organizations have refused prisoners' donated blood, he replies he has a liberty interest in earning credits by donating blood.

"[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). "[A]n individual claiming a protected [liberty] interest must have a legitimate claim of entitlement to it." Kentuchy Dep't of Corrections v. Thompson, 490 U.S. 454, 459 (1989). An abstract desire or unilateral hope does not establish a protected interest. Id.

Even if the statutory directive--that a "prisoner . . . shall be entitled" to reduce his sentence by donating blood--created a liberty interest and required the DOC to establish a blood donation program, see Hewit v. Helms, 459 U.S. 460, 469 (1983) (statutory "language of an unmistakably mandatory character" creates a liberty interest), Petitioner should not be allowed to donate blood for the purpose of earning credits if there is no need or request for it. See Raso v. Moran, 551 F.Supp. 294, 298-299 (D.R.I. 1982) (although state statute permitting prisoners to donate blood in exchange for reductions of their sentences created a liberty interest, it was possible that inmates would not be able to give blood if there was no need for it). Accordingly, Petitioner would not be entitled to

relief, even if he had a liberty interest in earning credits by donating blood.

Nor would Petitioner be entitled to relief on the basis of the ex post facto clause. As noted above, Petitioner does not dispute that he was not allowed to earn credits by donating blood prior to the 1988 amendments due to the lack of approved agencies or hospitals who were willing to take prisoners' donated blood. Therefore, the deletion of the blood donation program has not disadvantaged Petitioner under the ex post facto clause.

C. Availability of Benefits under Pre-amended Version of § 224

In ground four of his petition, Petitioner contends that the benefits of the pre-amended version of section 224 were available to a selected number of inmates in violation of federal due process and equal protection. He alleges that the availability and assignment to work depended on the geographic location of the prison and the "subjective whims of [the] individual case managers or other administrative support staff." In substance, Petitioner argues that he could have earned three-credit days for doing the exact same work if he had been assigned to work with a state, county, or municipality. Petitioner, thus, requests three-credit days for each day he worked regardless of whether he worked under section 138(A), 138(B), or 224(A).

Respondent asserts that the classification for each type of work was rationally related to a legitimate state interest in giving more credits to prisoners who were less violent.

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Additionally, Petitioner has not alleged that prison officials discriminated against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis of age, race, or handicap, in deciding whether to assign a prisoner to a job or in deciding which job to assign him). Accordingly, Petitioner is not entitled to earn three-credit days for each day he worked.

D. Dual Credits

Lastly, Petitioner argues he is entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute because "the additional obligations imposed on him by the 1988 amendment create a liberty interest in the additional earned credits under that amendment." In his reply, Petitioner adds that, while it is undisputed that he is entitled to benefits under the old statute, "there is absolutely no law that denies him the benefits of the subsequent amendment."

The Court disagrees. In Maynard v. Page, 798 P.2d at 629, the Oklahoma Court of Criminal Appeals expressly held that an inmate was entitled to earn credits under either the pre-amended or the amended earned-time-credit statute. The plain language of the amended version of section 138 further shows that the legislature did not intend inmates to earn credits under both the pre-amended and the amended version of the earned-time-credit statute. Okla. Stat. tit. 57, § 138(A) & (H) (1988). See Weaver v. Graham, 450 U.S. 24, 38-39 (1981) (Rehnquist, J. concurring).

Petitioner's contention that he is entitled to additional credits under the amended statute for maintaining a clean cell, personal hygiene, and good conduct is frivolous. While the ex post facto portions of new laws should be void, and any severable provisions which are not ex post facto may still be applied, Weaver, 450 U.S. at 36-37 n.22, the Court here has concluded that the amended statute, as presently applied by the DOC, does not raise ex post facto concerns. See also Kelly v. Evans, CIV-92-698-

C, Order (adopting Report and Recommendation) (W. D. Okla. Oct. 18, 1993) (holding that the ex post facto clause simply protects Petitioner from the retroactive application of the 1988 amendments when such application would be disadvantageous to him, and that nothing in the ex post facto prohibition entitles Petitioner to earn credits under both versions of the statute). In any case, the Court notes that the pre-amended statute indirectly required good conduct as it was entitled "credits for good conduct, blood donations, training program participation, etc." Okla. Stat. tit. 57, § 138 (Supp. 1985). Accordingly, Petitioner is not entitled to dual credits.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

IT IS SO ORDERED THIS 22nd day of December 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES EATON	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-C-1078-B
	)	
ANTONE J. BUCHMANN,	)	
	)	
Defendant.	)	

J U D G M E N T

Pursuant to the Jury's Verdict accepted and filed of record on the 22nd day of December, 1993, it is hereby ADJUDGED and DECREED that the Plaintiff, Charles Eaton, recover $2,500.00 against the Defendant, Antone J. Buchmann, plus pre-judgment interest at the rate of 7.42 percent per annum from October 20, 1992, until September 30, 1993 (the date of the offer to confess judgment), and post-judgment interest at the rate of 3.61 percent per annum. Costs actually incurred prior to September 30, 1993, are assessed against the Defendant and may be awarded upon timely application pursuant to Local Rule 54.1. Each party is to pay its own respective attorneys' fees.

IT IS SO ORDERED, this 23rd day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION AS CONSERVATOR FOR CIMARRON FEDERAL SAVINGS ASSOCIATION, Plaintiff, v. ROBERT E. MERRICK; P. PETER PRUDDEN, III; J. ANTHONY FRATES; STEPHEN I. FRATES; RAMONA F. PRUDDEN; and REALVEST, INC., an Oklahoma corporation, f/k/a/ FRACORP, INC, an Oklahoma corporation, Defendant.	)	Case No. 93-C-803-E

Notice of
DISMISSAL WITH PREJUDICE

The Resolution Trust Corporation, as Receiver for Cimarron Federal Savings Association and for its predecessors in interest including Phoenix Federal Savings and Loan Association, herewith dismisses all claims and causes of action in the above styled and captioned lawsuit, with prejudice to the refiling of same.

R. Mark Petrich, OBA #11956
Hall, Estill, Hardwick, Gable,
Golden & Nelson
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172-0141

Attorneys for The Resolution Trust Corporation

Frates1.14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROL SUE BOYD,

Plaintiff,

vs.

KENNETH FOSTER and
FLORENCE COOK,

Defendants,

and

KENNETH FOSTER,

Third Party Plaintiff,

vs.

FORD MOTOR CREDIT CORPORATION,

Third Party Defendant.

Case No. 92-C-883 B

STIPULATION OF DISMISSAL

COME NOW Carol Sue Boyd, Kenneth Foster, Florence Cook and Ford Motor Credit Corporation and hereby stipulate to the following:

1. Carol Sue Boyd hereby dismisses with prejudice her action against Florence Cook.

2. Kenneth Foster hereby dismisses with prejudice his counterclaim against Carol Sue Boyd.

3. Kenneth Foster further dismisses with prejudice his action against Ford Motor Credit Corporation.

4. Florence Cook hereby dismisses with prejudice her counterclaim against Carol Sue Boyd.

The parties are entering this stipulation of dismissal pursuant to a settlement agreement entered in this matter.

Respectfully sumitted,

Richard D. White, Jr. OBA #9549
111 West 5th Street, Suite 510
Tulsa, Oklahoma 74103-4259
(918) 582-7888

ATTORNEY FOR PLAINTIFF CAROL SUE BOYD

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Oklahoma City, Oklahoma 73139
(405) 636-0699

ATTORNEY FOR DEFENDANTS KENNETH FOSTER AND FLORENCE COOK

Robert H. Alexander, Jr.
P.O. Box 868
Oklahoma City, Oklahoma 73101-0868

ATTORNEY FOR THIRD PARTY DEFENDANT FORD MOTOR CREDIT CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TROY DRIVER, III,

Plaintiff,

vs.

GREG PROVINCE, et al.,

Defendants.

No. 92-C-879-E

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Troy Driver, III. Plaintiff shall take nothing on his claim. **Costs** are assessed against the Plaintiff, if timely applied for under Local Rule 54.1. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 27th day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TROY DRIVER, III,

Plaintiff,

vs.

GREG PROVINCE, et al.,

Defendants.

No. 92-C-879-E

ORDER

Before the Court is Defendants' motion for summary judgment filed on October 26, 1993. Plaintiff has not responded, and has failed to notify the Court of his change of address.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C). The Court also notes that the Plaintiff has the duty to notify the Court of his change of address.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion for summary judgment [docket #8] is **granted.**

SO ORDERED THIS 22nd day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY J. HARRIS, et al., Petitioners,	)	
vs.	)	No. 90-C-448-B, formerly ~~No. 90-C-448-C,~~ No. 90-C-475-C, etc., as consolidated.
RON CHAMPION, et al., Respondents.	)	

O R D E R

Petitioners have filed a Notice Of Pending Possibly Relevant Appeals bringing to the attention of the three-judge panel the appeals of each of its Findings of Fact, Conclusions of Law and Order (Findings), entered respectively on May 6, 1993 and September 8, 1993, in compliance with directives from the United States Court of Appeals for the Tenth Circuit.

Petitioners observe that the Findings being appealed from may compel this panel, and/or the individual judges to whom the individual cases will ultimately be returned, to "determine at what point in time after conviction the petitioners experienced inordinate delay to the extent of having been deprived of constitutional rights." Petitioners further observe such a determination, i.e. the so-called "bright line" test, may also be called for by the Tenth Circuit's recent Order that substituted District Judge James O. Ellison for panel member District Judge Thomas R. Brett "in order [for the panel] to proceed with adjudication of all claims other than the common issues of alleged delay in perfecting and adjudicating appeals from Oklahoma trial court criminal case convictions, including any and all damage

claims such as 42 U.S.C. § 1983 and Oklahoma Tort Claims Act claims." (Order of Oct. 3, 1993).

Disclaiming any intent to move for a stay of the instant proceedings, Petitioners nonetheless draw attention to their appeal issues, which include asking the Tenth Circuit to "draw a bright line" for determining at what point after conviction the petitioners were deprived of constitutional rights. Petitioners argue such pronouncement, if forthcoming, "would likely have a significant impact on most any decision by the three-judge panel and/or the individual federal judges in Oklahoma on all common issues, whether habeas, damages or otherwise." See Plaintiffs' Notice of Pending Possible Relevant Appeals.

This panel is mindful that a judicious pause, if appropriate, is often the preferred choice. However, an equal view may exist under these facts that it is expedient to go forward with so much of the remaining issues, e.g., § 1983 claims, that can be decided irrespective of a "bright line test."

The defense of absolute or qualified immunity, impled by the Oklahoma Court of Criminal Appeals (OCCA) judges and certain Oklahoma Indigent Defense System (OIDS) respondents, goes beyond a possible shielding from liability; it is a defense from enduring the litigation itself. See Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982). For example, if OCCA and its judges have absolute or qualified immunity, whether a bright line has been drawn or exceeded has no impact. This would also hold true for certain OIDS respondents and, arguably, other issues herein such as whether the

State of Oklahoma is a party and whether the Attorney General should be re-made a party.

The panel concludes it should determine those issues now before it, excluding therefrom any issue or issues that may be impacted by the drawing of a bright line by the Tenth Circuit Court of Appeals as a result of Petitioners' pending appeals. To the extent Petitioners' Notice Of Pending Possibly Relevant Appeals is considered a motion for stay of proceedings, the same is herewith DENIED.

The panel will first consider the Motion for Summary Judgment filed by the OIDS Respondents, who are the OIDS, Henry A. Meyer, III, Douglas L. Parr, Richard James, Richard Reeh, Betty Pfefferbaum, E. Alvin Schay, and Patti Palmer.

In their motion the OIDS Respondents set forth a statement of 25 material facts to which they contend there is no dispute. Under N.D. Okla. R. 15 the responding party is obliged to counter those facts to which it contends a genuine dispute exists.[1] Petitioners herein, in their response, failed to do so. Therefore, pursuant to N.D. Okla. R. 15, those facts are deemed admitted for the purpose

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[1] N.D. Okla. R. 15(B) provides, in part, as follows:

> B. Summary Judgment Motions. A brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists.

of summary judgment.[2] The panel will accordingly consider the stated undisputed material facts of the OIDS Respondents in its determination of the instant motion.

Prior to taking up the various issues presented on summary judgment, the panel will briefly review the current and past posture of OIDS in the instant litigation.

The original, single Harris case (90-C-448-C) was filed May 22, 1990. A second, single Harris case (90-C-475-C) was filed June 1, 1990. The OIDS Respondents were not named Respondents in either case. These cases are, of course, now consolidated with approximately 300 "Harris" type cases from all three of Oklahoma's federal judicial districts.

In the original Harris cases the District Court denied Harris' Petitions for Writs of Habeas Corpus, based upon the "failure to exhaust state remedies", i.e. the pending state (direct) appeal had not yet been heard. Harris appealed. Thereafter the Tenth Circuit Court of Appeals remanded the two Harris cases, Harris v. Champion, 938 F.2d 1062 (10th Cir. 1991), along with Hill v. Reynolds, 942 F.2d 1494 (10th Cir. 1991) and Richards v. Bellmon, 941 F.2d 1015 (10th Cir. 1991), the latter a Western District case based solely upon 42 U.S.C. § 1983. The Circuit Court ordered the District Court, in Harris to consolidate that case with "any other habeas actions that may be pending in the United States District Court for

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[2] N.D. Okla. R. 15(B) further provides: "All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

the Northern District of Oklahoma that raise a claim of untimely state appeal by the Oklahoma Appellate Public Defender's Office." 938 F.2d at 1071. The Harris litigation has since expanded to include habeas corpus "delay issue" cases from the Western and Eastern Districts presided over by the instant three-judge panel.

OIDS, singly, filed a motion to intervene in the two Harris cases, on the premise that "orders entered in the habeas case could [have] impact[ed] the ongoing process of appellate briefing by OIDS lawyers, such as by requiring that a petitioner's newer appeal be briefed before the older appeal of a non-petitioner." OIDS reply brief (#200) at 1. OIDS' appellate briefing efforts "had a 'first in, first out policy,' whereby appeals were ordinarily taken up for briefing in the same chronological order in which the cases were received by the System." Id.

OIDS' intervention attempt was essentially mooted when, in July, 1992, the now consolidated Petitioners filed a Supplement and Amended Complaint adding OIDS as a § 1983 party but deleting the Attorney General as a Respondent.[3]

In their Supplemental and Amended Complaint, Petitioners adopted in toto the multifarious pro se habeas corpus petitions, opting to preserve the "integrity and uniqueness" therein. The exact statement in Petitioners first cause of action, based on a prayer for habeas corpus relief, is as follows:

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[3] Petitioners now seek to re-add the Attorney General as a Respondent, along with a third cause of action (legal malpractice) against the current Respondents and new proposed Respondents, by their motion, filed March 12, 1993, to file yet another amended complaint (# 106).

> 56. Almost all Petitioners have filed pro se Complaints seeking relief under 28 U.S.C. § 2254. In order to protect the integrity and uniqueness of those pro se complaints and to insure that all of the allegations contained therein and their possible subtle nuances are protected and addressed, all of said pro se complaints seeking relief under 28 U.S.C. § 2254 are adopted and incorporated herein as fully and as completely as if set out in full at this point in this Supplemental and Amended Complaint.

In their answer the OIDS Respondents state that they are "without knowledge or information sufficient to form a belief as to the truth of the averment, because they have not been served with these alleged pleadings." Neither the Petitioners nor any of the parties have argued that any of the approximately 300 pro se petitions sought to make OIDS a Respondent or sought habeas relief against OIDS albeit they sought habeas relief because of OIDS. Suffice it to say, the Supplemental and Amended Complaint, as it now stands, fails to seek habeas corpus relief from OIDS.[4] However, it is without doubt that § 1983 relief is sought by the Petitioners against the OIDS Respondents.

PETITIONERS' SECTION 1983 ALLEGATIONS

Petitioners alleged in their Supplemental and Amended Complaint that the OIDS Respondents are liable under 42 U.S.C. § 1983 on two grounds: (1) that OIDS attorneys mishandled the

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[4] This may be a distinction without a difference in that while Petitioners may not have properly sought relief from OIDS there is little doubt Petitioners seek relief because of OIDS delay in filing appellant briefs on behalf of Petitioners. If this panel concludes, in its considerations, *infra*, that only the Warden Respondents are proper parties in a true habeas corpus action, see Spradling v. Maynard, 527 F. Supp. 398, 404 (W.D. Okla. 1981), the fact of habeas corpus allegations against OIDS *vel non* will perhaps be of little moment.

Petitioners' appeals; and (2) the OIDS Respondents have adopted policies and made decisions that caused the excessive delays of which Petitioners complained.

OIDS' PUTATIVE LIABILITY UNDER SECTION 1983

It is undisputed that OIDS is a statutory agency of the State of Oklahoma. Any damage recovery against OIDS would necessarily expend itself from the Oklahoma State Treasury. Generally, the Eleventh Amendment of the United States Constitution bars federal court lawsuits seeking damages against state agencies, as well as states. Bishop v. John Doe 1, 902 F.2d 809, 810 (10th Cir.), cert denied, 498 U.S. 873 (1990). The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

The Supreme Court has recognized the Eleventh Amendment's consistent application to bar suits against a state or state agency by citizens of the same state. Papasan v. Allain, 478 U.S. 265, 276 (1986).

Title 42 U.S.C. § 1983 provides a federal avenue through which to remedy alleged deprivations of civil liberties but it is not available for parties who seek a remedy against a state or state agency for the same alleged deprivations. This is because such suits are barred unless the State has waived its immunity or unless Congress has exercised the power of federal supremacy under the Fourteenth Amendment to override such immunity. Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989).

Further, such immunity is a jurisdictional bar that is applicable to protect a state or a state agency regardless of whether the relief sought is legal or equitable. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-01 (1984).

Such Eleventh Amendment immunity, broad though it may be, extends only to the state, state agencies and state officers in their official capacities, and does not protect county, municipal or local officials. Meade v. Grubbs, 841 F.2d 1512, 1525 (10th Cir. 1988).

Typically, the preeminent issue when a state agency is involved is whether the Eleventh Amendment state immunity extends to such agency. Some relevant factors in determining whether an agency qualifies for Eleventh Amendment immunity are: (1) if a judgment would expend itself on the state treasury; (2) the nature of the state agency's functions, powers, and responsibilities; (3) the state agency's relation to and control by other units of government; (4) any corporate status specifically accorded such agency; (5) the state agency's ability to sue or be sued; (6) the state agency's power to hold property in its own name or that of the state. Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678 (9th Cir. 1991). In this Circuit, "such a determination is made by examining the power, nature and characteristics of the agency under state law." Meade v. Grubbs, 841 F.2d at 1525 (citing Mount Healthy City Sch. Dist. Bd. of Edu. v. Doyle, 429 U.S. 274, 280 (1977)).

In the instant matter, the issue whether OIDS is or is not a state agency is settled by Petitioners' choice not to dispute the

OIDS Respondents' undisputed material fact # 1. Notwithstanding such concession, the panel concludes that OIDS: (1) is a state agency, and (2) is a state agency that is entitled to Eleventh Amendment immunity.

In addition to the immunity afforded OIDS by the Eleventh Amendment, this panel is of the view that Petitioners' § 1983 claims against OIDS could not be sustained for several relevant reasons. First, OIDS is not a "person" subject to liability under 42 U.S.C. § 1983. See Will v. Michigan Dep't of State Police, 491 U.S. at 65-66. Second, because all of Petitioners' appeals have been briefed, the issue as to injunctive relief against OIDS is moot and so conceded by Petitioners' counsel.

Accordingly, the panel concludes that the present Motion For Summary Judgment, as to the Respondent OIDS, should be and the same is hereby GRANTED.

THE REMAINING OIDS' RESPONDENTS

The remaining OIDS' Respondents are Henry A. Meyer, III, Douglas L. Parr, Richard James, Richard Reeh, Betty Pfefferbaum, E. Alvin Schay, and Patti Palmer.

Respondents Meyer and Parr are present members of the OIDS Board, a 5-member oversight board whose members are appointed by the Governor of the State of Oklahoma. These members receive no compensation for their services. Respondents James and Reeh, both Oklahoma attorneys in private law practice, served on the OIDS Board from 1989 to 1991. The OIDS Board formerly governed the Appellate Public Defender System, the predecessor to OIDS.

Respondent Pfefferbaum, a physician, served on the OIDS Board between 1992 and 1993.

None of the present or former Board members among the OIDS Respondents has represented any of the Petitioners during the course of their appeals. The role of Board members is to establish policies and oversee the OIDS' operation, rather than to represent individual clients.

Respondent Schay was Appellate Public Defender from 1982 to 1991, and Appellate Indigent Defender during 1991 to 1992. By law, he served as court-appointed counsel in all indigent appeals assigned to OIDS. In addition, Schay had administrative responsibilities.

Defendant Palmer served in various attorney positions in the Appellate Public Defender System between 1980 and August of 1991. Palmer represented only one Petitioner, Doyle King, during the early stages of King's appeal in 1986. From August, 1991 to August, 1992, Palmer was OIDS' Executive Director, an administrative position. The position did not involve client representation until July 1, 1992. On that date, legislation reassigned the client representation responsibilities previously exercised by the Appellate Indigent Defender to the Executive Director.

Respondents Meyer, Parr, James, Reeh, and Pfefferbaum (as well as Respondents Schay and Palmer) have been sued in two capacities, officially and individually. Any judgment against these Respondents (including Schay and Palmer, to be discussed more fully, *infra*,) in their official capacity would impact the state

treasury of the State of Oklahoma. Therefore official capacity damage claims are likewise barred by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 169-70 (1985).

The panel concludes the Motion for Summary Judgment as to Respondents Meyer, Parr, James, Reeh, Pfefferbaum, Schay, and Palmer, in their official capacities, should be and the same is hereby GRANTED. However, the individual OIDS Respondents in their individual capacities are not afforded the same Eleventh Amendment immunity from Petitioners' § 1983 claims against them. See Ritchie v. Wickstrom, 938 F.2d 689, 692 n.5 (6th Cir. 1991).

Petitioners allege in their Supplemental and Amended Complaint that the OIDS individual Respondents have adopted policies and made decisions that caused the excessive delays of which they complain. The panel will herein review the relevant undisputed facts established by the OIDS individual Respondents.

Neither OIDS, nor any of the OIDS Respondents, has ever had any policy requiring delay in the briefing of client appeals. OIDS has had a "first in, first out policy," whereby appeals were ordinarily taken up for briefing in the same chronological order in which the cases were received by OIDS. Had OIDS been adequately funded and staffed for its caseload, operation of the first in, first out policy would not have caused, or have been associated with, any excessive briefing delays. When postponement of filing a particular brief was necessary, OIDS lawyers moved for extensions of time in accordance with Okla.Crim.App.R. 3.4(D). No policy of OIDS, nor of any of the OIDS Respondents, was the moving force

behind delays in briefing of cases assigned to OIDS. The moving force behind the briefing delays at issue in this case was the disproportionate size of OIDS' caseload in relation to the size of its legal staff. Maximum attorney staffing levels for OIDS were determined by funding decisions made by the Oklahoma Legislature. OIDS' caseload levels were determined by the number of appointment orders entered by the Oklahoma trial judges. Since at least 1987, OIDS has diligently sought additional funds and personnel, from the Oklahoma Legislature and elsewhere, to reduce the backlog of unbriefed non-capital appeals. These efforts began to meet with success in 1992. None of the actions of the OIDS Respondents, with reference to the Petitioners' appeals, were motivated in whole or in part by discriminatory intent. The OIDS Respondents, in their policymaking capacities, did not act with the intention or purpose of violating any of the Petitioners' rights.

Respondents Meyer, Parr, James, Reeh, and Pfefferbaum (the Board Respondents) offer numerous defenses in opposition to Petitioners' § 1983 claims against them in their individual capacities. The Board Respondents deny they are state actors and therefore deny they acted under color of law, which is one of the essential elements in a § 1983 action. See Keney v. Derbyshire, 718 F.2d 352, 354 (10th Cir. 1983). The panel is of the view that, under the allegations of Petitioners' Supplemental and Amended Complaint against the Board Respondents, and their statement of undisputed facts, the conduct of the Board Respondents are acts done within the ambit of their official duties and therefore are

acts done under color of law.

As stated above, notwithstanding that the conduct of the individual Board Respondents comprises "official acts", individual officials caught in the cross-hairs of "individual capacity" suits are not shielded by Eleventh Amendment immunity but do have recourse to the defense of official or qualified immunity, which the Board Respondents invoke.

"Qualified" or "official" immunity, so-called, is essentially protection for an individual real-person party from becoming liable on a damage claim judgment for acts done in the course of his or her official duties. Harlow v. Fitzgerald, 457 U.S. at 807. The official will be immune from liability if the conduct alleged in the complaint did not violate "clearly established, statutory or constitutional rights of which a reasonable person would have known." Id. at 818; accord Hilliard v. City & County of Denver, 930 F.2d 1516, 1518 (10th Cir.) *cert. denied,* 112 S. Ct. 656 (1991). The issue of whether the official acted in an objectively reasonable manner is one to be resolved by the panel. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). An official's qualified immunity "is an immunity from suit" rather than a mere defense to liability. Like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial, making summary judgment disposition particularly appropriate. Powell v. Mikulecky, 891 F.2d 1454, 1456 (10th Cir. 1989) (citing Mitchell v. Forsyth, 472 U.S. at 526, 530).

The Board Respondents, i.e. the policy makers of OIDS and its

predecessor, argue that no policy of OIDS has caused any constitutional violations as alleged by Petitioners. The panel agrees. OIDS' central policy was "first in, first out", a time-honored model of fairness. The real issue was one of inadequate funding and staffing. These funding decisions were made by the Oklahoma Legislature, which OIDS diligently importuned. For the OIDS Board Respondents it was a problem "they were powerless to cure." Manous v. State, 797 P.2d 1005, 1006 (Okla. Crim. 1990).

The Board Respondents also argue that their policies and actions were not the "moving force of the constitutional violation" if in fact such occurred, citing Polk County v. Dodson, 454 U.S. 312, 326 (1981). The panel concludes the Board Respondents were a "moving force" only in relation to solving a crisis of potential constitutional stature, not in creating same. Nor does this panel view the Board Respondents as having exposure to vicarious liability in their roles as administrators and overseers of the OIDS staff of lawyers. Vicarious liability through the doctrine of respondeat superior is not an available premise for a § 1983 claim. City of Canton v. Harris, 489 U.S. 378, 385 (1989).

The panel concludes the Motion For Summary Judgment as to the Board Respondents should be and the same is hereby GRANTED.

The panel next considers the two OIDS Respondents who acted as lawyers for the Petitioners, Respondents Schay and Palmer. Again the first inquiry under a § 1983 claim is whether these parties acted under color of law. Respondents Schay and Palmer deny they acted under color of law in performing the duties imposed upon them

as lawyers for Petitioners. A public defender does not act under color of law "when performing the lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Polk County v. Dodson, 454 U.S. at 325. Petitioners fail to provide the panel with authority in support of their claims against Respondents Schay and Palmer since, as asserted by the OIDS Respondents, there are no reported decisions known to this panel imposing § 1983 liability against a public defender or public defender system, in a suit by a client, since Polk County was decided.

Petitioners counter the OIDS Respondents' Polk County defense by arguing that wholesale requests by OIDS for extensions of time of inordinate lengths without consideration for individual clients or permission to seek such extensions, is not one of a lawyer's traditional functions. These Respondents do not deny repeated requests for extensions of time on behalf of their various clients. However, these Respondents were faced with a problem, not of their own making, which could only be solved by state legislative action. Again it was a problem they were "powerless to cure". Manous v. State, 797 P.2d at 1005. The panel concludes that Respondents Schay and Palmer, in their efforts as attorneys for the Petitioners were functioning in a lawyer's traditional role and, as such, were not acting under color of law. Accordingly, Respondents Schay and Palmer face no exposure under § 1983 for the performance of their duties as a lawyer on behalf of Petitioners. To the extent that Respondents Schay and Palmer performed administrative duties for OIDS, the panel concludes the reasoning discussed as to the Board

Respondents, *supra*, would apply with equal comport to Respondents Schay and Palmer. The panel therefore concludes the performance of administrative duties by Respondents Schay and Palmer creates no exposure to § 1983 liability notwithstanding such administrative performances were imbued with color of law.

The panel concludes the OIDS Respondents', OIDS, Henry A. Meyer, III, Douglas L. Parr, Richard James, Richard Reeh, Betty Pfefferbaum, E. Alvin Schay, and Patti Palmer, Motion for Summary Judgment is hereby GRANTED. A Judgment in conformance with this Order will be entered simultaneously herein.

The panel will next consider OCCA's and the individual judges' motion to dismiss. In the Supplemental and Amended Complaint, Petitioners allege two violations of 42 U.S.C. § 1983 on the part of OCCA and its judges: (1) the granting of extensions of time for OIDS to file its appellate briefs, allegedly for unreasonable periods of time, and (2) once cases are fully briefed, OCCA and its judges take an unreasonable period of time in which to render a decision. The relief requested against either OCCA specifically or against all Respondents is: (1) release of the petitioners from custody; (2) money damages; (3) attorney fees; (4) injunctive relief enjoining OCCA from granting any extensions of time requested by OIDS in cases presently before OCCA; and (5) injunctive relief enjoining OCCA from granting any extensions of time of over 30 days requested by OIDS to file appellate briefs in any case not presently before OCCA.

OCCA and its judges argue that they are not proper parties to

this litigation, but that the Tenth Circuit merely intended that their amicus views be sought, citing Harris v. Champion, 938 F.2d at 1071. Addressing the requested relief, the movants contend that since none of the Petitioners are in the custody of OCCA or its judges, no release from custody may be exacted from OCCA and its judges. Next, they assert that OCCA is not a "person" as contemplated by 42 U.S.C. § 1983, citing Coopersmith v. Supreme Court, State of Colo., 465 F.2d 993, 994 (10th Cir. 1972). Third, they rely upon the doctrine of judicial immunity as a shield from any money damages, citing Mireles v. Waco, ___ U.S. ___, ___, 112 S. Ct. 286, 288 (1991)(per curiam). Because the granting of extensions of time and the delay in issuing a decision are "judicial acts," movants contend that they are fully immune.

In response, Petitioners argue that to dismiss OCCA and its judges would be to ignore the law of the case, in that the Tenth Circuit has directed that the entire adjudicative process be examined for delay, citing Hill v. Reynolds, 942 F.2d at 1497. Petitioners also point to the Tenth Circuit's Mandamus Order of April 22, 1993, at pages 6-7, which specified that delay by the Attorney General and OCCA are to be considered in fashioning a remedy. Petitioners ask this panel to leave movants in the case at the district court level and allow movants to present their argument to the Tenth Circuit Court of Appeals at the appropriate time.

The grant of absolute immunity to judges, prosecutors, and certain administrative officials insures that the judicial process

is not impeded by concerns of personal liability for damages. Austin v. Borel, 830 F.2d 1356, 1358 (5th Cir. 1987). Absolute immunity has been extended to judges acting within the scope of their official capacity. Russ v. Uppah, 972 F.2d 300, 303 (10th Cir. 1992). The panel is cognizant of the delays in the adjudicative process; however, OCCA and its judges' actions, if any, responsible for the alleged delays in the administrative process is conduct within the scope of absolute immunity. See Mireles v. Waco, ____ U.S. at _____, 112 S.Ct. at 288; Butz v. Economou, 438 U.S. 478, 512 (1978). Therefore, the motion of OCCA and its judges to dismiss Petitioner's claim is hereby GRANTED.

The panel will next consider Petitioners' motion to allow the filing of a second supplemental and amended complaint. Petitioners request that the panel permit them to reinstate the Attorney General of the State of Oklahoma as a party Respondent, and to add a claim against the Respondents State of Oklahoma, OIDS, and its Board pursuant to the Oklahoma Governmental Tort Claims Act, 51 Okla.Stat. §§151-71 ("the Act"). The specific claim sought to be asserted is legal malpractice, arising out of the delay in appellate briefing which is the subject of this litigation.

Rule 15(a) Fed. R. Civ. P., requires that leave to amend be freely given when justice so requires; however, futility of amendment will justify denial of leave to amend. Sooner Prods. Co. v. McBride, 708 F.2d 510, 512 (10th Cir. 1983)(per curiam). For the reasons given below, the panel finds that the requested amendment would be futile, and is therefore DENIED.

Petitioners failed to name the Attorney General as a party Respondent in their Supplemental and Amended Complaint of July 13, 1992. Now, Petitioners ask to reinstate the Attorney General as a party Respondent based upon the now unsupported belief (Petitioners' motion was filed on March 12, 1993) that the sudden influx of appellant briefs filed by OIDS would cause "the Attorney General's previously rather timely filing of appellee briefs [to be] slowed, thereby contributing to the overall appellate delay . . ." and "will extend the Attorney General's briefing schedule beyond the 60 day period allotted by law." (Brief at 7). The events that have unfolded since March 12, 1993 have proven Petitioners' concern to be unwarranted. The Attorney General's office, as reported to the Court at the hearing held on August 13, 1993, has timely filed all appellee briefs in the subject cases. Accordingly, the alleged necessity to add the Attorney General as a party has been rendered moot.

Petitioners acknowledge the existence of 51 Okla. Stat. §§ 156 & 157, which require the presentation of a claim under the Act to the state or political subdivision before any legal action based on that claim may proceed. Petitioners ask the panel to waive this statutory requirement on the basis that the State of Oklahoma is already aware of the factual bases of Petitioners' claims. Petitioners have cited no authority, and the panel is aware of none, by which this Court may waive the administrative claims process established by state law. For this reason alone, the motion to amend should be DENIED.

The Respondents also request denial of the motion based upon the Eleventh Amendment of the United States Constitution. The Supreme Court has stated:

> The Eleventh Amendment provides as follows:
>
> > The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
> >
> > Despite the narrowness of its terms, since Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak & Circle Village, ___ U.S. ___, ____, 111 S. Ct. 2578, 2581 (1991) (citations omitted).

At 51 Okla. Stat. §§ 152.1(B) & 162(E), the Act expressly denies waiver of the State's Eleventh Amendment rights. "[I]n order for a state statute . . . to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)(emphasis in original). Title 51 Okla. Stat. § 163(C) provides that "[s]uits instituted pursuant to the provisions of this act shall name as defendant the state or the political subdivision against which liability is sought to be established." There has been no contention that the OIDS Board or OIDS itself constitute self-insured political subdivisions discussed in 51 Okla. Stat. § 159(C); indeed, paragraph 62 of the

Petitioner's proposed additional claim alleges that these entities are state agencies. The Eleventh Amendment proscribes, in the absence of consent, suits against the State or one of its agencies. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. at 100. The fact that the claims sought to be added are pendent state-law claims does not override the Eleventh Amendment. See id. at 120-21. Because state agencies are named as Respondents, the panel concludes that any judgment recovered on this attempted claim would be paid by the State pursuant to 51 Okla. Stat. § 159(D). "[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Edelman v. Jordan, 415 U.S. 651, 663 (1974). For the foregoing reasons, the panel concludes that the proposed amendment would be futile, and therefore will not be permitted.

It is the Order of the panel that the motion of the Petitioners to allow the filing of a second supplemental and amended complaint should be and the same is hereby DENIED.

IT IS SO ORDERED this 27th day of December, 1993.

FRANK H. SEAY, Chief Judge
United States District Court
Eastern District of Oklahoma

JAMES O. ELLISON, Chief Judge
United States District Court
Northern District of Oklahoma

WAYNE E. ALLEY
United States District Judge
Western District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANTHONY J. HARRIS, et al.,

Petitioners,

vs.

RON CHAMPION, et al.,

Respondents.

No. 90-C-448-B, formerly ~~No. 90-C-448-C~~, No. 90-C-475-C, etc., as consolidated.

JUDGMENT

This action came on for hearing before the panel, the Honorable Frank H. Seay, Chief Judge, United States District Court for the Eastern District of Oklahoma, Honorable Wayne E. Alley, United States District Judge, Western District of Oklahoma and Honorable James O. Ellison, Chief Judge, United States District Court for the Northern District of Oklahoma, presiding, and a decision having been duly rendered in the Court's Order sustaining Respondents OIDS' and OCCA's motions for summary judgment and OCCA's motion to dismiss filed heretofore,

IT IS HEREBY ORDERED AND ADJUDGED that the Respondents OIDS' and OCCA's motions for summary judgment and OCCA's motion to dismiss are hereby sustained.

DATED this 27 day of December, 1993.

FRANK H. SEAY, Chief Judge
United States District Court
Eastern District of Oklahoma

JAMES O. ELLISON, Chief Judge
United States District Court
Northern District of Oklahoma

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Wayne Alley

WAYNE E. ALLEY
United States District Judge
Western District of Oklahoma

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PETER J. McMAHON, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. 93-C-263-B

ORDER

This matter comes on before the court upon the stipulation of all parties and the court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiff, Peter J. McMahon, Jr. against the defendant, United States of America are hereby dismissed with prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 27th day of Dec, 1993.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO CONTENT AND FORM:

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463
Attorney for the Defendant

PETER J. McMAHON, JR.
2028 East 51st St., Apt. A
Tulsa, OK 74105
Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID W. RICHARD,

Plaintiff,

vs.

No. 92-C-1192-E

LARRY SILVERS,

Defendants.

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, David W. Richard. Plaintiff shall take nothing on his claim. **Costs** are assessed against the Plaintiff, if timely applied for under Local Rule 54.1. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 27th day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

OBA #6731

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESUS SALAZAR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 93-C-598-B
	)	
EASTSIDE AUTO MART, INC.	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

Now on this 28th day of December, 1993, the Stipulation of Dismissal with Prejudice filed by the parties herein comes before the Court. Having considered the same, the Court hereby finds that the above captioned action should be dismissed with prejudice and that each party shall bear its own fees and costs incurred.

AND IT IS SO ORDERED.

Thomas R. Brett
JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SCOTT TURNHAM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-758-B
	)	
MICHEAL CARR, et al.,	)	
	)	
Respondent.	)	

ORDER

Before the Court are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response, and Petitioner's reply.

Petitioner is presently incarcerated pursuant to a conviction for First Degree Manslaughter in the District Court of Tulsa County in Case No. CRF-88-1827.

On June 11, 1993, Petitioner filed this instant petition raising constitutional challenges to the 1988 amendments to Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the earned-time-credit statute). Petitioner asserted (1) that he was entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute; and (2) that the benefits of the pre-amended version of section 224 were available to a selected number of inmates. Petitioner sought the maximum benefits of the pre-amended version of section 224 and all the additional credits under the amended version of the earned-time-credit statute.

I. BACKGROUND

A. Statutory Provisions

At the time of Petitioner's convictions, the DOC awarded each inmate credits according to the type of job or activity he was engaged in. Every inmate who worked or attended school earned one-credit day for each day he engaged in such activity. Okla. Stat. tit. 57, § 138(A) (Supp. 1985). Every inmate who worked for the Oklahoma State Industries, Private Prison Industries, or Agricultural Production or satisfactorily participated in a vocational training program earned two-credit days for each day he engaged in such activity. Id. § 138(B). Every inmate who instead worked for a state, county, or municipality earned three-credit days for each day he worked. Okla. Stat. tit. 57, § 224(A) (1981).

In addition to these earned time credits, an inmate was entitled to a deduction of twenty days for each pint of blood he donated to the American Red Cross or to any approved agency or hospital. Okla. Stat. tit. 57, § 138(B) (1981). However, no inmate could receive credit for more than four donations in any twelve-month period. Id. The statute further provided that blood-time credits could not be revoked by the Department of Corrections or any of its delegated authorities. Id.

Effective November 1, 1988, the Oklahoma Legislature amended section 138 so that "[e]very inmate . . . shall have their term of imprisonment reduced monthly, based upon" the assignment to one of four class levels. Okla. Stat. tit. 57, § 138(A) (Supp. 1988). Under this system, possible credits range from zero per month

(Class 1) to 44 per month (Class 4). Id. § 138(C)(2). Educational achievement and completion of departmentally approved programs also entitle an inmate to earn credits, but in no case more than ninety credits per calendar year. Id. § 138(F). Section 224, amended at the same time, also displaces the set credits for work assignments with a state, county, or municipality, and instead, references section 138 for calculations of those credits. Okla. Stat. tit. 57, § 224(A) (Supp. 1988). The 1988 amendments further provided that as of November 1, 1988, "all inmates currently under the custody of the Department of Corrections shall receive their assignments and all credits from that date forward shall be calculated pursuant to this act." Id. § 138(H) (Supp. 1988).

B. Case Law and DOC's Response

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), abrogated on other grounds, Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals found that:

> [A]fter a comparison of the statutes, before and after the amendment, it is obvious that 57 O.S. Supp. 1988, §§ 138 and 224 are disadvantageous to petitioner and other similarly situated prisoners. On its face, the amended statute adds requirements and reduces the number of monthly earned credits available to an inmate who abides by prison rules and adequately performs his or her assigned tasks. By definition, this reduction lengthens the period that someone in petitioner's position must spend in prison. Thus, the amended statute constricts an inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result simply runs afoul of the prohibition against ex post facto laws.

The court then held that inmates "who are disadvantaged by the

amended statute, shall be entitled to the credits allotted under the statute effective on the date their crime was committed." Id.

In State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. 1990), the Oklahoma Court of Criminal Appeals clarified its holding in Ekstrand by stating that an inmate was not entitled to benefits under both the original (1981) and amended (1988) statutes, but was entitled only to credits allotted under the statute effective on the date the crime was committed.

Following the Ekstrand opinion, the DOC implemented a procedure whereby all inmates received credits on a monthly basis under the amended version. If an inmate believed he had been disadvantaged by application of the credit under the amended version, he could apply for the additional credits he would have received under the old version. The DOC, however, did not award the pre-1988 credits until thirty days before discharge, and required the inmates to keep track of their pre-1988 credits. The DOC had apparently misinterpreted the Ekstrand holding to mean that a sentence could not be reduced by the pre-November 1, 1988 credits until the prisoner was entitled to immediate discharge.

In April 1993, the Eastern District of Oklahoma held that the amended version of sections 138 and 224 was ex post facto as applied to inmates whose crimes were committed before November 1, 1988, and thus, that inmates with pre-1988 crimes were entitled to credits only under the pre-1988 statute. The court held that the amended version was so dissimilar to the pre-existing statute that the statutes could not be compared. The court further held that it

was not clear that the Oklahoma legislature had intended to make available credits under the amended version to inmates whose crimes were committed before November 1, 1988. Lastly, the Court held that the DOC should provide each inmate a monthly computation of the pre-November 1, 1988 credits. Scales v. Reynolds, CIV-90-369-S and CIV-90-375-S, Order (adopting Report and Recommendation) (E.D. Okla. Apr. 7, 1993).

Following the Scales opinion, the DOC developed a new procedure for the monthly comparison and award of credits. Although all inmates still receive credits under the amended-credit statute, the DOC now makes a month-end comparison of the number of credits an inmate (who is incarcerated for a crime pre-dating the 1988 amendment) received under the amended statute and the number of credits he would have received under the pre-amended statute. If the credits under the pre-amended statute exceed those under the amended statute, the inmate's sentence is reduced according to the number of credits under the pre-amended statute for that month. If, on the other hand, the credits under the amended statute exceed those under the pre-amended statute, the inmate's sentence is reduced according to the number of credits under the amended statute for that month. The DOC then provides each inmate a monthly print-out showing the total credits received.[1]

[1]To implement this new policy, the DOC made a lump sum award in August 1993, of those credits which prior to that date had been carried on DOC's records but had not yet been awarded to eligible inmates pursuant to DOC's previous policy.

II. DISCUSSION

A. Dual Credits

Petitioner argues he is entitled to credits under both the pre-amended and the amended version of the earned-time-credit statute. He argues the Oklahoma legislature intended to award credits under both system, and he should be rewarded for the additional tasks he is required to perform under the 1988 amendments.

The Court disagrees. In Maynard v. Page, 798 P.2d at 629, the Oklahoma Court of Criminal Appeals expressly held that an inmate was entitled to earn credits under either the pre-amended or the amended earned-time-credit statute. The plain language of the amended version of section 138 further shows that the legislature did not intend inmates to earn credits under both the pre-amended and the amended version of the earned-time-credit statute. Okla. Stat. tit. 57, § 138(A) & (H) (1988). See Weaver v. Graham, 450 U.S. 24, 38-39 (1981) (Rehnquist, J. concurring).

Petitioner's contention that he is entitled to additional credits under the amended statute for maintaining a clean cell, personal hygiene, and good conduct is frivolous. While the ex post facto portions of new laws should be void, and any severable provisions which are not ex post facto may still be applied, Weaver, 450 U.S. at 36-37 n.22, the Court here concludes that the amended statute, as presently applied by the DOC, does not raise ex post facto concerns. See also Kelly v. Evans, CIV-92-698-C, Order (adopting Report and Recommendation) (W. D. Okla. Oct. 18, 1993)

from the retroactive application of the 1988 amendments when such application would be disadvantageous to him, and that nothing in the ex post facto prohibition entitles Petitioner to earn credits under both versions of the statute). In any case, the Court notes that the pre-amended statute indirectly required good conduct as it was entitled: "credits for good conduct, blood donations, training program participation, etc." Okla. Stat. tit. 57, § 138 (Supp. 1985). Accordingly, Petitioner is not entitled to dual credits.

B. Availability of Benefits under Pre-amended Version of § 224

Next, Petitioner contends that the benefits of the pre-amended version of section 224 were available to a selected number of inmates in violation of the equal protection clause. He alleges he did not have an equal opportunity to earn three-credit days because the availability of work depended on the institution's needs and the location of the prison. Petitioner, thus, requests three-credit days for each day he worked regardless of whether he worked under section 138(A), 138(B), or 224(A).

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Equal Protection Clause. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert.

denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Additionally, Petitioner has not alleged that prison officials discriminated against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis of age, race, or handicap, in deciding whether to assign a prisoner to a job or in deciding which job to assign him). Accordingly, Petitioner is not entitled to earn three-credit days for each day he worked.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

IT IS SO ORDERED THIS 22nd day of Dec 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK S. JAMES,)
)
Petitioner,)
)
vs.) No. 93-C-766-B
)
MICHEAL CARR, et al.,)
)
Respondent.)

ORDER

Before the Court are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response, and Petitioner's reply.

Petitioner is presently incarcerated pursuant to a conviction for Murder in the Second Degree from the District Court of Mays County in Case No. CRF-85-34.

On August 19, 1993, Petitioner filed this instant petition raising constitutional challenges to the 1988 amendments to Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the earned-time-credit statute). Petitioner asserted (1) that the amended version of sections 138 and 224 was an ex post facto law; (2) that the amended version of section 138 which deleted the opportunity to earn credits for blood donations was an ex post facto law; (3) that the benefits of the pre-amended version of section 224 were available to a selected number of inmates; and (4) that Petitioner was entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute. Petitioner sought the maximum benefits of the pre-amended version of section 224 and "all the additional credits he ha[d] thus far accumulated under 57 O.S.

(1991) § 138," the amended version.

I. BACKGROUND

A. Statutory Provisions

At the time of Petitioner's convictions, the DOC awarded each inmate credits according to the type of job or activity he was engaged in. Every inmate who worked or attended school earned one-credit day for each day he engaged in such activity. Okla. Stat. tit. 57, § 138(A) (Supp. 1985). Every inmate who worked for the Oklahoma State Industries, Private Prison Industries, or Agricultural Production or satisfactorily participated in a vocational training program earned two-credit days for each day he engaged in such activity. Id. § 138(B). Every inmate who instead worked for a state, county, or municipality earned three-credit days for each day he worked. Okla. Stat. tit. 57, § 224(A) (1981).

In addition to these earned time credits, an inmate was entitled to a deduction of twenty days for each pint of blood he donated to the American Red Cross or to any approved agency or hospital. Okla. Stat. tit. 57, § 138(B) (1981). However, no inmate could receive credit for more than four donations in any twelve-month period. Id. The statute further provided that blood-time credits could not be revoked by the Department of Corrections or any of its delegated authorities. Id.

Effective November 1, 1988, the Oklahoma Legislature amended section 138 so that "[e]very inmate . . . shall have their term of imprisonment reduced monthly, based upon" the assignment to one of

four class levels. Okla. Stat. tit. 57, § 138(A) (Supp. 1988). Under this system, possible credits range from zero per month (Class 1) to 44 per month (Class 4). Id. § 138(C)(2). Educational achievement and completion of departmentally approved programs also entitle an inmate to earn credits, but in no case more than ninety credits per calendar year. Id. § 138(F). Section 224, amended at the same time, also displaces the set credits for work assignments with a state, county, or municipality, and instead, references section 138 for calculations of those credits. Okla. Stat. tit. 57, § 224(A) (Supp. 1988). The 1988 amendments further provided that as of November 1, 1988, "all inmates currently under the custody of the Department of Corrections shall receive their assignments and all credits from that date forward shall be calculated pursuant to this act." Id. § 138(H) (Supp. 1988).

B. Case Law and DOC's Response

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), abrogated on other grounds, Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals found that:

> [A]fter a comparison of the statutes, before and after the amendment, it is obvious that 57 O.S. Supp. 1988, §§ 138 and 224 are disadvantageous to petitioner and other similarly situated prisoners. On its face, the amended statute adds requirements and reduces the number of monthly earned credits available to an inmate who abides by prison rules and adequately performs his or her assigned tasks. By definition, this reduction lengthens the period that someone in petitioner's position must spend in prison. Thus, the amended statute constricts an inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed

> before its enactment. This result simply runs afoul of the prohibition against ex post facto laws.

The court then held that inmates "who are disadvantaged by the amended statute, shall be entitled to the credits allotted under the statute effective on the date their crime was committed." Id.

In State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. 1990), the Oklahoma Court of Criminal Appeals clarified its holding in Ekstrand by stating that an inmate was not entitled to benefits under both the original (1981) and amended (1988) statutes, but was entitled only to credits allotted under the statute effective on the date the crime was committed.

Following the Ekstrand opinion, the DOC implemented a procedure whereby all inmates received credits on a monthly basis under the amended version. If an inmate believed he had been disadvantaged by application of the credit under the amended version, he could apply for the additional credits he would have received under the old version. The DOC, however, did not award the pre-1988 credits until thirty days before discharge, and required the inmates to keep track of their pre-1988 credits. The DOC had apparently misinterpreted the Ekstrand holding to mean that a sentence could not be reduced by the pre-November 1, 1988 credits until the prisoner was entitled to immediate discharge.

In April 1993, the Eastern District of Oklahoma held that the amended version of sections 138 and 224 was ex post facto as applied to inmates whose crimes were committed before November 1, 1988, and thus, that inmates with pre-1988 crimes were entitled to credits only under the pre-1988 statute. The court held that the

amended version was so dissimilar to the pre-existing statute that the statutes could not be compared. The court further held that it was not clear that the Oklahoma legislature had intended to make available credits under the amended version to inmates whose crimes were committed before November 1, 1988. Lastly, the Court held that the DOC should provide each inmate a monthly computation of the pre-November 1, 1988 credits. Scales v. Reynolds, CIV-90-369-S and CIV-90-375-S, Order (adopting Report and Recommendation) (E.D. Okla. Apr. 7, 1993).

Following the Scales opinion, the DOC developed a new procedure for the monthly comparison and award of credits. Although all inmates still receive credits under the amended-credit statute, the DOC now makes a month-end comparison of the number of credits an inmate (who is incarcerated for a crime pre-dating the 1988 amendment) received under the amended statute and the number of credits he would have received under the pre-amended statute. If the credits under the pre-amended statute exceed those under the amended statute, the inmate's sentence is reduced according to the number of credits under the pre-amended statute for that month. If, on the other hand, the credits under the amended statute exceed those under the pre-amended statute, the inmate's sentence is reduced according to the number of credits under the amended statute for that month. The DOC then provides each inmate a monthly print-out showing the total credits received.[1]

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[1]To implement this new policy, the DOC made a lump sum award in August 1993, of those credits which prior to that date had been carried on DOC's records but had not yet been awarded to eligible

II. DISCUSSION

A. Work Credits

In his first two grounds for relief, Petitioner contends that the amended version of sections 138 and 224 is ex post facto as applied to him, and thus, that the DOC should calculate his earned-time credits under the pre-amended version of sections 138 and 224.

Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be subject of an ex post facto violation. If the credits under the old system exceed those under the new system, the Petitioner's sentence is reduced in accordance with the number of credits received under the old system for that month. If, on the other hand, credits under the new system are more advantageous, the new system is applied that month.

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). As noted above, the DOC has implemented a procedure whereby the Petitioner's circumstances are evaluated on a monthly basis, and the Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that the Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation. Accordingly, the Court concludes the Petitioner is not entitled to relief on his

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inmates pursuant to DOC's previous policy.

first two grounds.

B. Blood Credits

In his third ground for relief, Petitioner asserts that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto alteration of the length of his imprisonment. Petitioner does not dispute that the Red Cross and other organizations have refused prisoners' donated blood, and that prison officials discontinued the blood donation program long before he entered the system.

Respondent states that, because the blood donation program was suspended long before the Petitioner was convicted due to the lack of qualified organizations that were willing to accept prisoners' donated blood, the elimination of blood donation credits does not amount to an ex post facto violation. Respondent further argues that the deletion of the blood donation program rests within the discretion of prison officials, and that the DOC should not be forced to collect blood from inmates when the donees refuse to accept it.

"[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). "[A]n individual claiming a protected [liberty] interest must have a legitimate claim of entitlement to it." Kentuchy Dep't of Corrections v. Thompson, 490 U.S. 454, 459 (1989). An abstract desire or unilateral hope does not establish a protected interest. Id.

Even if the statutory directive--that a "prisoner . . . shall be entitled" to reduce his sentence by donating blood--created a liberty interest and required the DOC to establish a blood donation program, see Hewit v. Helms, 459 U.S. 460, 469 (1983) (statutory "language of an unmistakably mandatory character" creates a liberty interest), Petitioner should not be allowed to donate blood for the purpose of earning credits if there is no need or request for it. See Raso v. Moran, 551 F.Supp. 294, 298-299 (D.R.I. 1982) (although state statute permitting prisoners to donate blood in exchange for reductions of their sentences created a liberty interest, it was possible that inmates would not be able to give blood if there was no need for it). Accordingly, Petitioner would not be entitled to relief, even if he had a liberty interest in earning credits by donating blood.

Nor would Petitioner be entitled to relief on the basis of the ex post facto clause. As noted above, Petitioner does not dispute that he was not allowed to earn credits by donating blood prior to the 1988 amendments due to the lack of approved agencies or hospitals who were willing to take prisoners' donated blood. Therefore, the deletion of the blood donation program has not disadvantaged Petitioner under the ex post facto clause.

C. Availability of Benefits under Pre-amended Version of § 224

In ground four of his petition, Petitioner contends that the benefits of the pre-amended version of section 224 were available to a selected number of inmates in violation of federal due process

and equal protection. He alleges that the availability and assignment to work depended on the geographic location of the prison and the "subjective whims of [the] individual case managers or other administrative support staff." In substance, Petitioner argues that he could have earned three-credit days for doing the exact same work if he had been assigned to work with a state, county, or municipality. Petitioner, thus, requests three-credit days for each day he worked regardless of whether he worked under section 138(A), 138(B), or 224(A).

Respondent asserts that the classification for each type of work was rationally related to a legitimate state interest in giving more credits to prisoners who were less violent.

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see

Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Additionally, Petitioner has not alleged that prison officials discriminated against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis of age, race, or handicap, in deciding whether to assign a prisoner to a job or in deciding which job to assign him). Accordingly, Petitioner is not entitled to earn three-credit days for each day he worked.

D. Dual Credits

Lastly, Petitioner argues he is entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute because he is now required to perform additional tasks to earn good time credits.

In Maynard v. Page, 798 P.2d at 629, the Oklahoma Court of Criminal Appeals expressly held that an inmate was entitled to earn credits under either the pre-amended or the amended earned-time-credit statute. The plain language of the amended version of section 138 further shows that the legislature did not intend inmates to earn credits under both the pre-amended and the amended version of the earned-time-credit statute. Okla. Stat. tit. 57, § 138(A) & (H) (1988). See Weaver v. Graham, 450 U.S. 24, 38-39

(1981) (Rehnquist, J. concurring).

While the ex post facto portions of new laws should be void, and any severable provisions which are not ex post facto may still be applied, Weaver, 450 U.S. at 36-37 n.22, the Court here has concluded that the amended statute, as presently applied by the DOC, does not raise ex post facto concerns. See also Kelly v. Evans, CIV-92-698-C, Order (adopting Report and Recommendation) (W. D. Okla. Oct. 18, 1993) (holding that the ex post facto clause simply protects Petitioner from the retroactive application of the 1988 amendments when such application would be disadvantageous to him, and that nothing in the ex post facto prohibition entitles Petitioner to earn credits under both versions of the statute). In any case, the Court notes that the pre-amended statute indirectly required good conduct as it was entitled: "credits for good conduct, blood donations, training program participation, etc." Okla. Stat. tit. 57, § 138 (Supp. 1985). Accordingly, Petitioner is not entitled to dual credits.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

IT IS SO ORDERED THIS 2nd day of Dec 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEONARD B. HOUSTON, Plaintiff,	)	
vs.	)	No. 93-C-105-B
STANLEY GLANZ, et al, Defendants.	)	

JUDGMENT

In accord with the Order granting Defendants' motions for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against Plaintiff, Leonard B. Houston. Plaintiff shall take nothing on his claim. **Costs** are assessed against the Plaintiff, if timely applied for under Local Rule 54.1. Each side is to pay its respective **attorney fees.**

SO ORDERED THIS 27 day of dec, 1993.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PATRICK McKINNON,)
)
Petitioner,)
)
vs.) No. 93-C-731-B
)
MICHEAL CARR, et al.,)
)
Respondent.)

ORDER

Before the Court are Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Respondent's response, and Petitioner's reply.

Petitioner is presently incarcerated pursuant to a conviction for Rape in the First Degree, and two counts of Forcible Sodomy from the District Court of Tulsa County in Case No. CRF-85-4208 entered on April 4, 1986.

On August 2, 1993, Petitioner filed this instant petition raising constitutional challenges to the 1988 amendments to Okla. Stat. tit. 57, §§ 138 and 224 (Supp. 1988) (the earned-time-credit statute). Petitioner asserted (1) that the amended version of sections 138 and 224 was an ex post facto law; (2) that the amended version of section 138 which deleted the opportunity to earn credits for blood donations was an ex post facto law; (3) that the benefits of the pre-amended version of section 224 were available to a selected number of inmates; and (4) that Petitioner was entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute. Petitioner sought the maximum benefits of the pre-amended version of section 224 and "all

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the additional credits he ha[d] thus far accumulated under 57 O.S. (1991) § 138," the amended version.

I. BACKGROUND

A. Statutory Provisions

At the time of Petitioner's convictions, the DOC awarded each inmate credits according to the type of job or activity he was engaged in. Every inmate who worked or attended school earned one-credit day for each day he engaged in such activity. Okla. Stat. tit. 57, § 138(A) (Supp. 1985). Every inmate who worked for the Oklahoma State Industries, Private Prison Industries, or Agricultural Production or satisfactorily participated in a vocational training program earned two-credit days for each day he engaged in such activity. Id. § 138(B). Every inmate who instead worked for a state, county, or municipality earned three-credit days for each day he worked. Okla. Stat. tit. 57, § 224(A) (1981).

In addition to these earned time credits, an inmate was entitled to a deduction of twenty days for each pint of blood he donated to the American Red Cross or to any approved agency or hospital. Okla. Stat. tit. 57, § 138(B) (1981). However, no inmate could receive credit for more than four donations in any twelve-month period. Id. The statute further provided that blood-time credits could not be revoked by the Department of Corrections or any of its delegated authorities. Id.

Effective November 1, 1988, the Oklahoma Legislature amended section 138 so that "[e]very inmate . . . shall have their term of

imprisonment reduced monthly, based upon" the assignment to one of four class levels. Okla. Stat. tit. 57, § 138(A) (Supp. 1988). Under this system, possible credits range from zero per month (Class 1) to 44 per month (Class 4). Id. § 138(C)(2). Educational achievement and completion of departmentally approved programs also entitle an inmate to earn credits, but in no case more than ninety credits per calendar year. Id. § 138(F). Section 224, amended at the same time, also displaces the set credits for work assignments with a state, county, or municipality, and instead, references section 138 for calculations of those credits. Okla. Stat. tit. 57, § 224(A) (Supp. 1988). The 1988 amendments further provided that as of November 1, 1988, "all inmates currently under the custody of the Department of Corrections shall receive their assignments and all credits from that date forward shall be calculated pursuant to this act." Id. § 138(H) (Supp. 1988).

B. Case Law and DOC's Response

In Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990), abrogated on other grounds, Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), the Oklahoma Court of Criminal Appeals found that:

> [A]fter a comparison of the statutes, before and after the amendment, it is obvious that 57 O.S. Supp. 1988, §§ 138 and 224 are disadvantageous to petitioner and other similarly situated prisoners. On its face, the amended statute adds requirements and reduces the number of monthly earned credits available to an inmate who abides by prison rules and adequately performs his or her assigned tasks. By definition, this reduction lengthens the period that someone in petitioner's position must spend in prison. Thus, the amended statute constricts an

> inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result simply runs afoul of the prohibition against ex post facto laws.

The court then held that inmates "who are disadvantaged by the amended statute, shall be entitled to the credits allotted under the statute effective on the date their crime was committed." Id.

In State ex. rel. Maynard v. Page, 798 P.2d 628, 629 (Okla. Crim. 1990), the Oklahoma Court of Criminal Appeals clarified its holding in Ekstrand by stating that an inmate was not entitled to benefits under both the original (1981) and amended (1988) statutes, but was entitled only to credits allotted under the statute effective on the date the crime was committed.

Following the Ekstrand opinion, the DOC implemented a procedure whereby all inmates received credits on a monthly basis under the amended version. If an inmate believed he had been disadvantaged by application of the credit under the amended version, he could apply for the additional credits he would have received under the old version. The DOC, however, did not award the pre-1988 credits until thirty days before discharge, and required the inmates to keep track of their pre-1988 credits. The DOC had apparently misinterpreted the Ekstrand holding to mean that a sentence could not be reduced by the pre-November 1, 1988 credits until the prisoner was entitled to immediate discharge.

In April 1993, the Eastern District of Oklahoma held that the amended version of sections 138 and 224 was ex post facto as applied to inmates whose crimes were committed before November 1, 1988, and thus, that inmates with pre-1988 crimes were entitled to

credits only under the pre-1988 statute. The court held that the amended version was so dissimilar to the pre-existing statute that the statutes could not be compared. The court further held that it was not clear that the Oklahoma legislature had intended to make available credits under the amended version to inmates whose crimes were committed before November 1, 1988. Lastly, the Court held that the DOC should provide each inmate a monthly computation of the pre-November 1, 1988 credits. Scales v. Reynolds, CIV-90-369-S and CIV-90-375-S, Order (adopting Report and Recommendation) (E.D. Okla. Apr. 7, 1993).

Following the Scales opinion, the DOC developed a new procedure for the monthly comparison and award of credits. Although all inmates still receive credits under the amended-credit statute, the DOC now makes a month-end comparison of the number of credits an inmate (who is incarcerated for a crime pre-dating the 1988 amendment) received under the amended statute and the number of credits he would have received under the pre-amended statute. If the credits under the pre-amended statute exceed those under the amended statute, the inmate's sentence is reduced according to the number of credits under the pre-amended statute for that month. If, on the other hand, the credits under the amended statute exceed those under the pre-amended statute, the inmate's sentence is reduced according to the number of credits under the amended statute for that month. The DOC then provides each inmate a

monthly print-out showing the total credits received.[1]

II. DISCUSSION

A. Work Credits

In his first two grounds for relief, Petitioner contends that the amended version of sections 138 and 224 is ex post facto as applied to him, and thus, that the DOC should calculate his earned-time credits under the pre-amended version of sections 138 and 224.

Respondent submits that under the new procedure Petitioner cannot be disadvantaged, and thus, cannot be subject of an ex post facto violation. If the credits under the old system exceed those under the new system, the Petitioner's sentence is reduced in accordance with the number of credits received under the old system for that month. If, on the other hand, credits under the new system are more advantageous, the new system is applied that month.

Petitioner replies that the "DOC is still attempting to compare both systems prior to granting monthly credits in direct contravention of the court's order [in] Scales." (Docket #9 at 1.)

A statute is not applied in violation of the ex post facto clause as long as it does not disadvantage an individual. Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a law to be ex post facto, it must be retrospective, and it must disadvantage the offender affected by it). As noted above,

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[1]To implement this new policy, the DOC made a lump sum award in August 1993, of those credits which prior to that date had been carried on DOC's records but had not yet been awarded to eligible inmates pursuant to DOC's previous policy.

the DOC has implemented a procedure whereby the Petitioner's circumstances are evaluated on a monthly basis, and the Petitioner receives credits under the most advantageous version. Thus under the new procedure, it is impossible that the Petitioner will be disadvantaged, and therefore, it is equally impossible that he will be the subject of an ex post facto violation.

Petitioner's contention that the DOC is improperly comparing the two systems is immaterial in this case. This Court is not bound by the holding in Scales that the pre-amended and amended versions of the earned-time-credit statute cannot be compared. In any case, the Court fails to understand why the Petitioner argues that the pre-amended statute should be applied under Scales, when the amended statute has been more advantageous to the Petitioner at least for the last several months. Accordingly, the Court concludes the Petitioner is not entitled to relief on his first two grounds.

B. Blood Credits

In his third ground for relief, Petitioner asserts that the amended version of section 138 which deletes the opportunity to earn credits for blood donations is an ex post facto alteration of the length of his imprisonment. In the alternative, Petitioner asserts that the pre-amended statute created a liberty interest in the opportunity to earn credits for blood donations.

Respondent states that, because the blood donation program was suspended long before the Petitioner was convicted due to the lack

of qualified organizations that were willing to accept prisoners' donated blood, the elimination of blood donation credits does not amount to an ex post facto violation. Respondent further argues that the deletion of the blood donation program rests within the discretion of prison officials, and that the DOC should not be forced to collect blood from inmates when the donees refuse to accept it.

Although Petitioner does not dispute that the Red Cross and other organizations have refused prisoners' donated blood, he replies he has a liberty interest in earning credits by donating blood.

"[A] state creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). "[A]n individual claiming a protected [liberty] interest must have a legitimate claim of entitlement to it." Kentuchy Dep't of Corrections v. Thompson, 490 U.S. 454, 459 (1989). An abstract desire or unilateral hope does not establish a protected interest. Id.

Even if the statutory directive--that a "prisoner . . . shall be entitled" to reduce his sentence by donating blood--created a liberty interest and required the DOC to establish a blood donation program, see Hewit v. Helms, 459 U.S. 460, 469 (1983) (statutory "language of an unmistakably mandatory character" creates a liberty interest), Petitioner should not be allowed to donate blood for the purpose of earning credits if there is no need or request for it. See Raso v. Moran, 551 F.Supp. 294, 298-299 (D.R.I. 1982) (although

state statute permitting prisoners to donate blood in exchange for reductions of their sentences created a liberty interest, it was possible that inmates would not be able to give blood if there was no need for it). Accordingly, Petitioner would not be entitled to relief, even if he had a liberty interest in earning credits by donating blood.

Nor would Petitioner be entitled to relief on the basis of the ex post facto clause. As noted above, Petitioner does not dispute that he was not allowed to earn credits by donating blood prior to the 1988 amendments due to the lack of approved agencies or hospitals who were willing to take prisoners' donated blood. Therefore, the deletion of the blood donation program has not disadvantaged Petitioner under the ex post facto clause.

C. Availability of Benefits under Pre-amended Version of § 224

In ground four of his petition, Petitioner contends that the benefits of the pre-amended version of section 224 were available to a selected number of inmates in violation of federal due process and equal protection. He alleges that the availability and assignment to work depended on the geographic location of the prison and the "subjective whims of [the] individual case managers or other administrative support staff." In substance, Petitioner argues that he could have earned three-credit days for doing the exact same work if he had been assigned to work with a state, county, or municipality. Petitioner, thus, requests three-credit days for each day he worked regardless of whether he worked under

section 138(A), 138(B), or 224(A).

Petitioner does not have a constitutional right in prison employment, and he has failed to demonstrate that he has any cognizable interest under state law or prison regulation. See Ingram v. Papalia, 804 F.2d 595, 596-97 (10th Cir. 1986). In any case, the classification and work assignments of prisoners are matters of prison administration within the discretion of prison administrators, and beyond reach of the Due Process and Equal Protection Clauses. See Altizer v. E.L. Paderick, 569 F.2d 812, 813 (4th Cir.), cert. denied, 435 U.S. 1009 (1978) (classification and work assignments were within discretion of prison administrators beyond reach of Due Process Clause); see also Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (prisoners do not have liberty or property interest in maintaining a certain prison job); Bryan v. Werner, 516 F.2d 233, 240 (3rd Cir. 1975) (same). But see Dupont v. Saunders, 800 F.2d 8, 10 (1st Cir. 1986) (prisoners do not have a property interest in obtaining or maintaining prison jobs, unless state laws or regulations show otherwise). Additionally, Petitioner has not alleged that prison officials discriminated against him on the basis of his age, race, or handicap, in choosing whether to assign him a job or in choosing what job to assign him. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (prison officials cannot discriminate on the basis of age, race, or handicap, in deciding whether to assign prisoner to a job or in deciding which job to assign him). Accordingly, Petitioner is not entitled to earn three-credit days for each day

he worked.

D. Dual Credits

Lastly, Petitioner argues he is entitled to credits under both the pre-amended and the amended versions of the earned-time-credit statute because "the additional obligations imposed on him by the 1988 amendment create a liberty interest in the additional earned credits under that amendment." In his reply, Petitioner adds that, while it is undisputed that he is entitled to benefits under the old statute, "there is absolutely no law that denies him the benefits of the subsequent amendment."

The Court disagrees. In Maynard v. Page, 798 P.2d at 629, the Oklahoma Court of Criminal Appeals expressly held that an inmate was entitled to earn credits under either the pre-amended or the amended earned-time-credit statute. The plain language of the amended version of section 138 further shows that the legislature did not intend inmates to earn credits under both the pre-amended and the amended version of the earned-time-credit statute. Okla. Stat. tit. 57, § 138(A) & (H) (1988). See Weaver v. Graham, 450 U.S. 24, 38-39 (1981) (Rehnquist, J. concurring).

Petitioner's contention that he is entitled to additional credits under the amended statute for maintaining a clean cell, personal hygiene, and good conduct is frivolous. While the ex post facto portions of new laws should be void, and any severable provisions which are not ex post facto may still be applied, Weaver, 450 U.S. at 36-37 n.22, the Court here has concluded that

the amended statute, as presently applied by the DOC, does not raise ex post facto concerns. See also Kelly v. Evans, CIV-92-698-C, Order (adopting Report and Recommendation) (W. D. Okla. Oct. 18, 1993) (holding that the ex post facto clause simply protects Petitioner from the retroactive application of the 1988 amendments when such application would be disadvantageous to him, and that nothing in the ex post facto prohibition entitles Petitioner to earn credits under both versions of the statute). In any case, the Court notes that the pre-amended statute indirectly required good conduct as it was entitled "credits for good conduct, blood donations, training program participation, etc." Okla. Stat. tit. 57, § 138 (Supp. 1985). Accordingly, Petitioner is not entitled to dual credits.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied.**

IT IS SO ORDERED THIS 22nd day of Dec 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALVIN LEE COPELAND,

Plaintiff,

vs.

STANLEY GLANZ,

Defendants.

No. 93-C-713-E

ORDER

Before the Court is Defendants' motion for summary judgment filed on October 25, 1993. Plaintiff has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1(C).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendants' motion for summary judgment [docket #5] is **granted.**

SO ORDERED THIS 22nd day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RESOLUTION TRUST CORPORATION as Receiver for Red River Federal Savings and Loan Association, F.A.,

Plaintiff,

v.

CHERRY HILLS ASSOCIATES, L.P., et al.,

Defendants.

No. 91-CV-621-C

Notice of

DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, the Resolution Trust Corporation as Receiver for Red River Federal Savings and Loan Association, F.A., and would dismiss the above styled and numbered cause against the Defendant Public Service Company of Oklahoma without prejudice to future action.

Brad Burgess, OBA#10226
Attorney for the Resolution Trust Corporation as Receiver for Red River Federal Savings and Loan Association, F.A.
P.O. Box 1045
Lawton, Oklahoma 73502
(405) 355-8920

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 1993, a true and correct copy of the above and foregoing document was mailed, postage prepaid, to:

Cherry Hills Associates, L.P.
George A. Switlyk, General Partner
and George A. Switlyk
141 Dolphin Road,
Palm Beach, Florida 33480;

John O. Dean
Howard and Widdows
2021 S. Lewis, Suite 570
Tulsa, Oklahoma 74101

Lewis N. Carter
Doerner Stuart Saunders Daniel and Anderson
320 S. Boston Building, Suite 500
Tulsa, Oklahoma 74103

J. Dennis Semler
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103;

Neal E. McNeill, Jr.,
City Attorney
200 Civic Center, Room 316
Tulsa, Oklahoma 74103

Dana L. Rasure
Baker Hoster McSpadden Clark Rasure and Slicker
Attorney for the Receiver
800 Kennedy Building
Tulsa, Oklahoma 74103

United States of America ex rel.
Department of Housing and Urban Development
c/o United States Attorney for the Northern
District of Oklahoma
3600 Federal Courthouse, 333 W. 4th St.
Tulsa, Oklahoma 74103

Bank of Oklahoma, N.A., as successor in interest to
the National Bank of Tulsa
Stanley A. Lybarger, President
P.O. Box 2300
Tulsa, Oklahoma 74193

Philip N. Hughes d/b/a Southbank Development Company,
2840 S. Victor
Tulsa, Oklahoma 74114

Sam P. Daniel, Jr. d/b/a Southbank Development Company,
c/o Lewis Carter
320 S. Boston Building, Suite 500
Tulsa, Oklahoma 74103

Richard Hughes, individually, and d/b/a Southbank
Development Company
and Royal Manor South c/o Richard Hughes
7232 S. Atlanta
Tulsa, Oklahoma 74136

Harvey L. Hunter d/b/a Harvey Hunter Construction Company
10724 E. 29th
Tulsa, Oklahoma

Fourth National Bank of Tulsa
Jerry L. Hudson, President
515 South Boulder
Tulsa, Oklahoma 74101

Equidyne Capital Corporation, an Oklahoma corporation, and
Equidyne Industries, Inc., an Oklahoma corporation
c/o Oklahoma Secretary of State
101 State Capitol Building
Oklahoma City, Oklahoma 73105

Continental Casualty Company, an Illinois insurance
corporation
c/o Oklahoma Insurance Commission
P.O. Box 53408
Oklahoma City, Oklahoma 73152

Brad Burgess

BLF No. 12-1318
lp/red-river/cherry-hills/dismissal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY L. CHILDERS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 93-C-477-B

ORDER

On September 10, 1993, the Court ordered Petitioner to refile his petition for a writ of habeas corpus on the proper form within twenty days, or the court would dismiss this action. Petitioner has failed to refile his petition on the proper form. The Court will, thus, dismiss this action.

ACCORDINGLY, IT IS HEREBY ORDERED that this habeas corpus action be **dismissed.**

SO ORDERED THIS 22nd day of Dec., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. JARBOE SALES CO. Defendant.	CIVIL ACTION NO. 93-C-669-B

CONSENT DECREE

THIS CONSENT DECREE is made and entered into by and between the Equal Employment Opportunity Commission and Jarboe Sales Co.

On July 26, 1993, the Equal Employment Opportunity Commission instituted suit against Jarboe Sales Co. in the United States District Court for the Northern District of Oklahoma, Civil Action No. 93-C-669-B based upon a charge of discrimination filed by the Charging Party Melody Chester, against Jarboe Sales Co.

The above referenced action alleges that Jarboe Sales Co. violated Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a)(1), by requiring Melody Chester and a class of similarly situated individuals to take an involuntary maternity leave of absence because of their pregnancy.

The parties hereto desire to compromise and settle the differences embodied in the aforementioned consolidated lawsuit, and intend that the terms and conditions of the compromise and settlement be set forth in this Consent Decree ("Consent Decree").

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby

acknowledged, the parties agree as follows, the Court finds appropriate, and therefore, it is ORDERED, ADJUDGED AND DECREED that:

1. This Consent Decree resolves all issues raised in EEOC Charge No. 31B-90-0088. This Decree further resolves all issues in the Complaint filed by the EEOC in this case. The EEOC and Melody Chester waive further claims and/or litigation on all issues raised in the above referenced charge and Complaint. The Commission does not waive processing or litigating charges other than the above referenced charge.

2. The parties agree that this Consent Decree does not constitute an admission by Jarboe Sales Co. of any violation of Title VII of the Civil Rights Act of 1964.

3. Jarboe Sales Co. agrees that all hiring and promotion practices and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of sex or pregnancy in violation of Title VII of the Civil Rights Act of 1964.

4. Jarboe Sales Co. agrees that pregnant employees will not be placed on maternity leaves of absence involuntarily, if the employee desires to continue working and is not expressly prohibited from working by instructions from her treating physician.

5. Jarboe Sales Co. agrees to post and keep posted in conspicuous places on its premises the notice pertaining to the application of Title VII as prescribed by the Commission and

attached as Attachment A.

6. Within 10 days after this Consent Decree is filed with the district court, Jarboe Sales Co. shall make an award of backpay in the amount of $4,872.99, payable to Melody Chester, in settlement of this case. The check shall be delivered to Melody Chester by U.S. Certified Mail, return receipt requested. Within 3 days after payment is tendered, a copy of the check and any other payment documents shall be transmitted to the EEOC, including a copy of the certified return receipt, if any.

7. Jarboe Sales Co. shall make legal deductions for withholding of Federal income taxes and the employee portion of social security from the backpay amount. Jarboe Sales Co. shall include with the check an itemized statement indicating specific amounts paid and deductions made. All W-2 forms shall be provided as required by law. The defendant shall also be responsible to make all employer contributions to social security as required by law.

8. If Jarboe Sales Co. fails to tender payment or otherwise fails to timely comply with the terms of paragraphs 6 and 7, Jarboe Sales Co. shall:

a. Pay interest at the rate calculated pursuant to 26 U.S.C. Section 6621(b) on any untimely or unpaid amounts; and

b. Bear any additional costs incurred by the plaintiff caused by the non-compliance or delay of the defendant.

9. No party shall contest the validity of this Consent Decree nor the jurisdiction of the federal district court to

enforce this Consent Decree and its terms or the right of any party to bring an enforcement action upon breach of any term of this Consent Decree by any party. Nothing in this Decree shall be construed to preclude the Commission from enforcing this Decree in the event that Jarboe Sales Co. fails to perform the promises and representations contained herein. The Commission shall determine whether Jarboe Sales Co. has complied with the terms of this Consent Decree and shall be authorized to seek compliance with the Consent Decree through civil action in the United States District Court.

10. The parties agree to pay their own costs associated with this action.

11. The term of this Decree shall be for one (1) year.

SO ORDERED, ADJUDGED AND DECREED this 22nd day of Dec, 1993.

/s/ THOMAS R. BRETT

U.S. DISTRICT COURT JUDGE

Agreed to in form and content:

FOR THE PLAINTIFFS:

JEFFREY C. BANNON
Regional Attorney
Connecticut No. 301166

ROBERT A. CANINO
Supervisory Trial Attorney
Oklahoma Bar No. 011782

SUZANNE M. ANDERSON
Sr. Trial Attorney
Texas Bar No. 14009470

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
207 South Houston Street
Dallas, Texas 75238

FOR THE DEFENDANT:

JOHN JARBOE
JARBOE & STOERMER
1810 Mid Continental Tower
Tulsa, Oklahoma 74103

JOHN KEEFER
BREWER, WORTEN, ROBINETT,
JOHNSON, WORTEN & KING
P.O. Box 1066
Bartlesville, OK. 74005

NOTICE TO ALL EMPLOYEES
POSTED PURSUANT TO A CONSENT DECREE

1. This NOTICE is being posted as part of an agreement pursuant to a Consent Decree between Jarboe Sales Co. and the U.S. Equal Employment Opportunity Commission in the case: EEOC v. Jarboe Sales Co, CA-93-C-669-B.

2. Federal law requires that there be no discrimination against any employee or applicant for employment because of that person's race, color, religion, sex, pregnancy, national origin or age with respect to hiring, compensation, promotion, discharge or other terms, conditions or privileges of employment.

3. Jarboe Sales Co. agrees that all hiring and promotion practices and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of sex or pregnancy in violation of Title VII of the Civil Rights Act of 1964.

4. Jarboe Sales Co. agrees that pregnant employees will not be placed on maternity leaves of absence involuntarily.

5. This NOTICE will remain posted until January 1, 1995, and shall not be altered or removed until that time. Any questions about discrimination or pregnancy leave should be directed to _____.

SIGNED _____ day of _____, 1992.

_____
JOHN JARBOE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEENAN DEON WHITE,)
)
Plaintiff,)
)
vs.) No. 92-C-898-C
)
STANLEY GLANZ, et al.,)
)
Defendants.)

ORDER

On November 24, 1993, plaintiff filed a dismissal without prejudice in this action. Inasmuch as defendants had filed an answer, the cause may be dismissed only by order of the Court pursuant to Rule 41(a)(2) F.R.Cv.P. No filings subsequent to plaintiff's dismissal have been made.

It is the Order of the Court that this action is hereby dismissed without prejudice as to all defendants.

IT IS SO ORDERED this 22nd day of December, 1993.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOANNE NOE, §
§
Plaintiff, §
§
vs. §
§
COLOR TILE, INC., §
§
DANNY PITTMAN, individually §
and in his official capacity, §
§
RANDY BROWNING, individually, §
§
KEN LEAMAN, individually §
and in his official capacity, §
§
and §
§
LEON PRAEUNER, individually §
and in his official capacity, §
§
Defendants. §

Case No. 93-C-566B

AGREED FINAL JUDGMENT

On this day came on to be heard the Joint Motion For Entry of Agreed Final Judgment filed by Plaintiff Joanne Noe ("Plaintiff") and Defendant Color Tile, Inc., Danny Pittman, Leon Praeuner and Ken Leemon ("Defendants") and the Court, after considering the pleadings, is of the opinion that said Motion should be granted in its entirety. It is accordingly,

ORDERED, ADJUDGED and DECREED that all claims and causes of action asserted or which could have been asserted against Defendants Color Tile, Inc., Danny Pittman, Leon Praeuner and Ken Leemon by Plaintiff Joanne Noe are hereby dismissed with prejudice, and that

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Plaintiff take nothing on said claims and causes of action against Defendants. It is further

ORDERED, ADJUDGED and DECREED that all costs of court shall be taxed against the party incurring same.

SIGNED this 22nd day of Dec., 1993.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:

Kelly H. Caffey, Esq.
OBA #14686
Jessie M. Oakley
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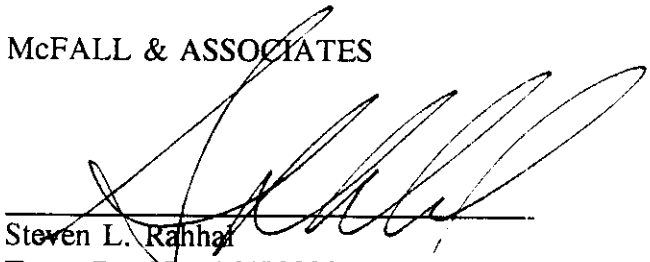
ATTORNEYS FOR PLAINTIFF

McFALL & ASSOCIATES



Steven L. Rahhal
Texas Bar No. 16473990
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(214) 987-3927 (Fax)

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA R. WEBBER,

Plaintiff,

vs.

HOWARD R. MEFFORD, Special Administrator of the Estate of GLEN DALE GIBBS, Deceased, THE CITY OF SAPULPA, OKLAHOMA, a municipal corporation, and TRACY GRIFFIN, individually and in his official capacity as a police officer for the City of Sapulpa, Oklahoma,

Defendants.

Case No. 93-C-636-B

J U D G M E N T

In accord with the Order entered herein on November 15, 1993, granting summary judgment in favor of Defendants, The City of Sapulpa, Oklahoma and Tracy Griffin, and against Plaintiff Linda R. Webber, and the Order entered herein on December 22, 1993, granting summary judgment in favor of Defendant Tracy Griffin and against Plaintiff Linda R. Webber, judgment is hereby entered in favor of Defendants, The City of Sapulpa, Oklahoma and Tracy Griffin, and against Plaintiff Linda R. Webber. Plaintiff shall take nothing of her claims. Costs are assessed against the Plaintiff, if timely applied for under Local Rule 54.1 and each party is to pay its respective attorney's fees.

DATED this 22nd day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA R. WEBBER,

Plaintiff,

vs.

HOWARD R. MEFFORD, Special Administrator of the Estate of GLEN DALE GIBBS, Deceased, THE CITY OF SAPULPA, OKLAHOMA, a municipal corporation, and TRACY GRIFFIN, individually and in his official capacity as a police officer for the City of Sapulpa, Oklahoma,

Defendants.

Case No. 93-C-636-B

O R D E R

This matter comes on for consideration of Plaintiff Linda R. Webber's (Webber) Motion For Reconsideration (docket entry #14). Also for consideration is Plaintiff's Request For Oral Argument Or Conference (docket entry #15).

Plaintiff has obtained new counsel who urge the Court's ruling, granting summary judgment in favor of Defendants The City of Sapulpa, Oklahoma (City) and Tracy Griffin (Griffin), individually and in his official capacity as a policy officer for the City of Sapulpa[1], was in error primarily because "[T]he Court did not address the actions of Defendant Griffin that the Plaintiff contends were recklessly in disregard of a known risk." Specifically, Webber complains that while the Court dealt with the

[1] Defendant Howard R. Mefford, Special Administrator of the Estate of Glen Dale Gibbs, Deceased, has not filed an answer herein and was not a movant as to the summary judgment motion in issue.

high-speed chase which came about when officer Griffin attempted to arrest escapee Glen Dale Gibbs, it failed to address Griffin's awakening of Gibbs who was asleep at the wheel of Gibbs' brother's vehicle.

As stated above this action arose from a police pursuit of a criminal suspect. In her Complaint Plaintiff Webber alleged that officer Griffin, of the Sapulpa Police Department, pursued an automobile driven by the criminal suspect, Glen Dale Gibbs ("Gibbs"), at a high rate of speed, causing Gibbs' vehicle to collide with a vehicle in which Plaintiff was a passenger, thereby injuring Plaintiff. Plaintiff filed this action pursuant to 42 U.S.C. §1983, alleging that Griffin and the City of Sapulpa violated Plaintiff's civil rights.

The following undisputed facts bear repeating:

1) On the morning of Sunday, January 5, 1992, at about 9:30 a.m., the Sapulpa Police Department received notice that Glen Dale Gibbs, a black male, had escaped from a correctional institution, and was: 1) suspected of rape; 2) believed to be in possession of firearms and a butcher knife; and 3) subject to a warrant for arrest. The Sapulpa Police Department dispatcher broadcast this information and a description of the vehicle Gibbs was driving to Sapulpa police officers. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin, attached as Exhibit A to Defendant's motion, and attachments).

2) Sapulpa Police Officer Tracy Griffin heard the dispatcher's transmission concerning Gibbs. Griffin knew and could recognize

Gibbs. While on patrol, Griffin observed a parked vehicle matching the dispatcher's description of Gibbs' car. The car was occupied by a person slumped over the steering wheel. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin).

3) After determining from a tag check that the car was registered to a James Gibbs, whom Griffin knew to be Gibbs' brother, Officer Griffin stopped to investigate. He observed the occupant of the car to be a black male, asleep at the wheel. He also saw a butcher knife in the rear floorboard of the car. Because both doors of the car were locked, Griffin tapped on the window of the automobile. (See Plaintiff's Complaint, Paragraph IV. See also affidavit of Tracy Griffin).

4) The occupant of the parked car awakened, looked up and saw Officer Griffin, who recognized the occupant of the car as Glen Dale Gibbs. The occupant had a can of beer propped in his lap. There were several cans of beer on the floorboard of the front passenger side of the vehicle which appeared to be empty, plus a 12-pack container. Gibbs immediately started the car and drove away at a high rate of speed to evade the police officer. Based on the information transmitted by the dispatcher, his identification of Gibbs, and his observation of the knife in the car, Griffin perceived Gibbs to be a threat to the safety of the public. Griffin returned to his police cruiser and notified the police dispatcher that he was in pursuit of the Gibbs' vehicle. Griffin activated the overhead lights and siren on the police cruiser. (See Plaintiff's Complaint, Paragraph IV. See also affidavit of Tracy Griffin).

5) The pursuit proceeded down a rural road and onto Highway 66, northbound toward Tulsa. After the vehicles had traveled 2.6 miles at a rate of speed which exceeded the speed limit, the Gibbs vehicle veered to the left. The Gibbs vehicle drove across the southbound oncoming lanes of traffic and collided with the vehicle in which Plaintiff was a passenger in the southbound lane/shoulder area of highway 66. This collision occurred approximately thirty minutes after the police dispatcher broadcast the information concerning Gibbs and approximately three minutes after the pursuit began. (See Plaintiff's Complaint, Paragraph IV. See also Affidavit of Tracy Griffin and attachments).

6) Both Gibbs and Griffin were traveling at approximately 85 miles per hour. The posted speed limit was 55 miles per hour. (Exhibit A to Plaintiff's brief in opposition to Defendants' motion for summary judgment).

Plaintiff asserted the Defendants violated her civil rights in violation of §1983.[2] The Court ruled that in order to establish §1983 liability, the Plaintiff must prove the Defendants' actions were the result of deliberate or reckless intent to deprive the

---

[2] 42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

Plaintiff of her constitutional rights, citing Daniels v. Williams, 474 U.S. 327, 331 (1986) and Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992). "[R]eckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." Medina, 960 F.2d at 1496 (citing Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990).

> An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to the risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing there is a significant risk of death' or grievous bodily injury. Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988(en banc), *cert. denied*, 489 U.S. 1065 (1989); Apodaca v. Roi Arriba County Sheriff's Dep't, 905 F.2d 1445, 1446-47 n. 3 (10th Cir. 1990)(reckless conduct in police pursuit cases must involve true indifference to risks created); Harris, 843 F.2d at 416; *see also* Temkin v. Frederick County Comm'rs, 945 F.2d 716, 720, 723 (4th Cir. 1991)(reckless conduct in police chase cases must "shock the conscience" to be actionable) *cert. denied*, ___ U.S. _____, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992).

Medina, 960 F.2d at 1496.

Plaintiff contended Officer Griffin's pursuit of Defendant Gibbs was reckless and showed an unreasonable disregard for the consequences of his actions. Plaintiff argued that Defendant Griffin knew Gibbs would flee and thus should not have "changed the status quo" and should not have continued the pursuit "after it was apparent the direction the chase was heading." Plaintiff contended Gibbs was "asleep and ineffectual until woken by Griffin and forced

to flee." Plaintiff further contended Griffin's actions were unreasonable and in disregard to a known risk -- that Gibbs would flee and injure someone.

The Court concluded as a matter of law that the undisputed actions of Officer Griffin did not reflect "a wanton or obdurate disregard or complete indifference to risk." Medina, 960 F.2d at 1496; that in order to impose §1983 liability in police pursuit cases, the Plaintiff must establish an "unreasonable disregard of the consequences." Archuleta, 897 F.2d at 499; that although all high speed chases involve a risk of harm, not all such pursuits are unreasonable under the circumstances. The Court concluded that a reasonable jury could not find Officer Griffin's actions involved "reckless conduct" or "true indifference to the risks created." The Court further found that the actions of Officer Griffin did not "shock the conscience" of the Court.

The Court concluded Plaintiff failed to provide evidence establishing a violation of her civil rights by Officer Griffin who was granted summary judgment.

Plaintiff's Complaint also alleged that the City of Sapulpa was liable under §1983 for "failing to institute an adequate pursuit policy and/or by failing to train and supervise its officers properly." The Court ruled that it is well established that "[w]hen there is no underlying constitutional violation by a county officer, there cannot be an action for failing to train or supervise the officer." Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir. 1990)(quoting City of Los

Angeles v. Heller, 475 U.S. 796, 799 (1986)); that therefore summary judgment in favor of the City of Tulsa was appropriate. Furthermore, the Court noted that Plaintiff had provided no evidence of the City's pursuit policy or the City's alleged failure to train and supervise its officers.

The Court further ruled that Plaintiff had made no allegation that escapee Gibbs was acting "under color of state law" at the time of the accident and therefore Plaintiff's 42 U.S.C. §1983 claim as to Howard R. Mefford should be dismissed with prejudice.

In Plaintiff's Motion For Reconsideration, Webber argues that Griffin's awakening of Gibbs was an act of "reckless indifference" regarding the rights of those members of a "limited and specifically definable group", i.e. highway users, of which the Plaintiff was a member. Webber argues Griffin failed to use "caution" although specifically exhorted to do so by the police teletype. The Court notes the police teletype contained the phrase "use caution"; however, the police radio log[3] of the radio message, the only information Griffin was exposed to before the attempted arrest, did not contain the caveat "use caution".

Webber offers the expert testimony of police policy and procedure expert Professor Samuel G. Chapman of Sparks, Nevada, in support of her contention that Officer Griffin failed to act

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[3] The radio log was not attached as Exhibit B to Defendants' Brief as indicated therein but was attached as Exhibit B to Defendants' Brief in an identical companion case, Terhune v. Mefford, et al, 93-C-635-B, Northern District of Oklahoma. Terhune was the driver of the vehicle in which Plaintiff Webber was a passenger at the time of the collision with the Gibbs' vehicle.

properly by awakening Gibbs. In his affidavit Chapman concludes, after reviewing the entire file, that Officer Griffin acted in reckless disregard of a known risk. However, the Court notes expert Chapman states that "[T] radio report advised all law enforcement officers to 'use caution'[4] and Griffin has acknowledged that he received this report;" Further, Chapman fails to note that Officer Griffin's statement establishes that when he, Griffin, approached the vehicle in which Gibbs was sleeping the officer had his gun drawn. Notwithstanding the above, the Court does not weight nor consider the Chapman affidavit in making its determination herein.

Even if the Court did consider the belated Chapman affidavit, the Court is of the view that Chapman's conclusion that Officer Griffin acted in reckless disregard of a known risk is not supported by the undisputed facts. The weight to be given to an expert opinion is of no greater value than the reasons given in its support, and if no rational basis for the opinion is apparent or if the facts from which the opinion was derived do not justify it, the opinion is of no probative force. Downs v. Longfellow Corporation, 351 P.2d 999 (Okl.1960).

The Court concludes that a reasonable jury could not find Officer Griffin's actions, in awakening Gibbs, involved "reckless conduct" or "true indifference to the risks created." The Court further finds that the actions of Officer Griffin do not "shock the conscience" of the Court.

Lastly, the Court accommodates Webber's request to address the

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[4] which statement was in error.

issue of Griffin's qualified immunity *vel non* as follows: Any suit against Griffin in his official capacity is, in actuality a suit against the City of Sapulpa since any recovery thereat would expend itself on the City coffers. Since the City is a Defendant, Webber's Complaint as to Defendant Griffin in his official capacity is *sua sponte* DISMISSED.

Further, Griffin's defense of qualified immunity as to his personal capacity is, in the Court's view, well taken. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Qualified immunity is an immunity from suit rather than a mere defense to liability and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Powell v. Mikulecky, 891 F.2d 1454 (10th Cir. 1989). The Tenth Circuit has held that unless a reasonable officer would understand that his or her actions violated a clearly defined constitutional right, the officer is protected by qualified immunity. Mikulecky, at 1456. Hunter v. Bryant, 112 S.Ct. 534 (1991), citing Anderson v. Creighton, 483 U.S. 635 (1987).

It is obvious to the Court that Officer Griffin was acting under color of law while attempting to arrest escapee Gibbs. Griffin was acting within the scope of his employment with the City of Sapulpa and there is no sustainable allegation in Webber's Complaint nor in the undisputed facts to impose personal liability on Officer Griffin. The Court concludes the actions taken by Officer Griffin did not violate a clearly defined constitutional right of Plaintiff Webber.

Accordingly, the Court concludes summary judgment on the issue

of qualified immunity should be and the same is herewith GRANTED in favor of Defendant Griffin.

In summary, the Court denies Plaintiff's Motion For Reconsideration, denies Plaintiff's Request For Oral Argument Or Conference as moot, and grants Defendant Griffin's Motion For Summary Judgment on the issue of qualified immunity.

A Judgment in conformance with this Order and the Court's Order of November 15, 1993, filed November 16, 1993, will be entered simultaneously herewith.

IT IS SO ORDERED this 22nd day of December, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-21-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 20 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CARDTOONS, L.C.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 93-C-576-E ✓
	)	
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

This action came on for trial before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS THEREFORE ORDERED that the action be dismissed on the merits.

ORDERED this 20th day of December, 1993.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DON R. GIBSON,

Plaintiff,

v.

DONNA E. SHALALA,

Defendant.

Case No. 90-C-1058-B

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed November 24, 1993 in which the Magistrate Judge recommended that the Motion for Attorney's Fees be both **granted in-part** and **denied in-part** as follows:

1. The Motion should be **granted** insofar as Mr. McTighe is awarded the sum of **$1,268.75** as his complete remaining attorney fee, said amount being in his Client Trust Account on behalf of Mr. Gibson.
2. The Motion should be **denied** insofar as Mr. McTighe should be denied further payment from the Government of the sum of $1,473.76.

The end result of the foregoing division is straightforward and is reached applying equitable principles.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and

hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 20th day of Dec, 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOLOMON BROADUS, Petitioner,	)	
vs.	)	No. 92-C-267-B
JACK COWLEY, Respondent.	)	

ORDER

Before the Court are Petitioner's first petition for a writ of habeas corpus, Petitioner's motion to amend and supplement [docket #8], Respondent's motion to dismiss for failure to exhaust state remedies [docket #10], and Petitioner's motions for appointment of counsel, for discovery, for leave of court to grant discovery, and to strike hearing [docket #13, 14, 15, 16].

I. BACKGROUND

In March 1992, Petitioner filed this habeas corpus action, alleging inordinate delay on the part of the Oklahoma Court of Criminal Appeals in rendering a decision in his direct appeal in violation of due process and equal protection. This action was initially consolidated with Harris v. Champion, but was later separated because Petitioner was not represented by the Oklahoma Indigent Defense System. In September 1992, Petitioner filed a second habeas corpus action, Broadus v. Cowley, 93-C-99-E (transferred from the Eastern District of Oklahoma), alleging his sentences were improperly enhanced with constitutionally inadmissible prior convictions.

The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction in a summary opinion on April 27, 1993. In July 1993, Petitioner moved for leave to amend this petition to allege that the summary opinion was inadequate and that his appellate counsel provided ineffective assistance.

II. DISCUSSION

The Court will exercise its discretion to deny Petitioner's motion for leave to amend this petition. As noted above, Petitioner has a second habeas corpus action, presently pending before this court, which raises issues regarding Petitioner's conviction and sentence.

The Court will also exercise its discretion to deny Petitioner's motion for appointment of counsel. See McCarthy v. Weinberg, 753 F.2d 836, 838-39 (10th Cir. 1985) (district court is vested with broad discretion in determining whether to appoint counsel). A litigant in a civil case has no constitutional right to appointed counsel. Durre v. Dempsey, 869 F.2d 543, 547 (10th Cir. 1989).

Regarding, Petitioner's claim of inordinate delay, the Court concludes that Petitioner is not entitled to relief. Although it is undisputed that there was excessive, inexcusable delay in the disposition of Petitioner's direct appeal, see Factual Information [docket #12], this Court agrees with the Second Circuit that habeas corpus relief based solely on previous inordinate delay is unavailable where the state appellate court has rendered a decision

affirming the conviction. See e.g. Muwwakkil v. Hoke, 968 F.2d 284, 285 (2nd Cir.), cert. denied, 113 S.Ct. 664 (1992).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's application for a writ of habeas corpus on the basis of inordinate delay in adjudicating his state criminal appeal is **denied.**

(2) Petitioner's motion to amend and supplement [docket #8], Respondent's motion to dismiss for failure to exhaust state remedies [docket #10], and Petitioner's motions for appointment of counsel, for discovery, for leave of court to grant discovery, and to strike hearing [docket #13, #14, #15, #16] are **denied.**

SO ORDERED THIS 20th day of Dec., 1993.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES E. McDONELL; FRANCES P. McDONELL; GEORGE J. McDONELL; SYLVIA S. McDONELL; STEVEN FRANCIS; and LONI FRANCIS,

Plaintiffs,

vs.

NOEL W. SMITH, a/k/a Noel Smith, Noel E. Smith, and Noel A. Smith; EXPRESS RESERVATIONS GROUP, INC., an Oklahoma corporation; and RN GROUP, LTD., an Oklahoma corporation,

Defendants.

NO. 93-C-972-B

JUDGMENT

This matter comes for hearing this 20th day of December, 1993, upon application and affidavit of the Plaintiffs duly made for judgment by default. It appears that Defendants Express Reservations Group, Inc. and RN Group, Ltd. are in default, and that the Clerk of the United States District Court for the Northern District of Oklahoma has previously searched the records and entered the default of the Defendants. It further appears upon Plaintiffs' affidavit that Defendants Express Reservations Group, Inc. and RN Group, Ltd., jointly and severally, are indebted to Plaintiffs James E. McDonell and Frances P. McDonell in the actual sum of $60,000.00, to Plaintiffs George J. McDonell and Sylvia S. McDonnel in the actual sum of $20,000.00, and to Plaintiffs Steven

Francis and Loni Francis in the actual sum of $5,000.00, plus interest, costs, and attorney fees as to each Plaintiff; and that default has been entered against Defendants for failure to appear. The Court, having heard the argument of counsel and being fully advised, finds that judgment should be entered for the Plaintiffs.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiffs James E. McDonell and Frances P. McDonell recover from Defendants Express Reservations Group, Inc. and RN Group, Ltd., jointly and severally, the sum of $60,000.00, in actual damages, together with interest at the rate of ten percent (10%) per annum from date of payment until paid, costs, and a reasonable attorney's fee to be determined by this Court, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiffs George J. McDonell and Sylvia S. McDonell recover from Defendants Express Reservations Group, Inc. and RN Group, Ltd., jointly and severally, the sum of $20,000.00, in actual damages, together with interest at the rate of ten percent (10%) per annum from date of payment until paid, costs, and a reasonable attorney's fee to be determined by this Court, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiffs Steven Francis and Loni Francis recover from Defendants Express Reservations Group, Inc. and RN Group, Ltd. the sum of $5,000.00, in actual damages, together with interest at the rate of ten percent (10%) per annum from date of payment until paid, costs,

and a reasonable attorney's fee to be determined by this Court, for all of which let execution issue.

Judgment rendered this 30th day of December, 1993.

S/ THOMAS B. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE: HENTGES, MICHAEL EDMUND HENTGES, NANCY GAIL AIR-X-LIMITED, INC., Plaintiff, v. MICHAEL EDMUND HENTGES, an individual, NANCY GAIL HENTGES, an individual, and HOWARD ANDREWS, JR., an individual Defendants.	DISTRICT COURT NO. 93-M-55-B Bankruptcy Case No. 92-02035-C Chapter 7 Bankruptcy Adversary No. 93-0165-C

FILED

DEC 21 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

Pursuant to 28 U.S.C. Section 157(c)(1) judgment is hereby entered in favor of the Plaintiff, Air-X-Limited, Inc., and against the Defendant, Howard L. Andrews, Jr., in the principal sum of $638,300.00, accrued interest through December 31, 1992 in the sum of $81,860.42, interest from January 1, 1993 at the rate of 12.00% per annum, costs of this action, accrued and accruing, including a reasonable attorneys fee of $2,500.00.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

BRIAN J. RAYMENT, OBA #7441
KIVELL, RAYMENT & FRANCIS
Triad Center, Suite 240
7666 East 61st Street
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(918) 254-0626

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUNNY JOSE, Plaintiff,	)	
vs.	)	Case No. 93-C-150-B
AMERICAN AIRLINES, INC., a Delaware corporation, and JERRY WALTERS, an individual, Defendants.	)	

JOINT STIPULATION OF DISMISSAL OF DEFENDANT JERRY WALTERS AND CONTRACT CAUSE OF ACTION

The undersigned, counsel for the parties to this action, hereby stipulate pursuant to Rule 41(a) of the Federal Rules of Civil Procedure to the dismissal of Defendant Jerry Walters and the breach of contract cause of action, with prejudice, and stipulate that no costs, expenses, or attorneys' fees shall be assessed against either party, to the extent expenses and fees were incurred specifically in connection with the named defendant or cause of action.

Respectfully submitted,

By: _____

Ralph Simon, OBA #8254
5700 E. 61st St., Ste. 103
Tulsa, Oklahoma 74136-2700
(918) 496-8008

ATTORNEY FOR PLAINTIFF
SUNNY JOSE

CONNER & WINTERS

By: _____

David R. Cordell, OBA #11272
Conner & Winters
2400 First National Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391

ATTORNEY FOR DEFENDANTS
AMERICAN AIRLINES, INC.,
and JERRY WALTERS

IT IS SO ORDERED this 21ST day of December, 1993.

_____
United States District Judge

ENTERED ON DOCKET

DATE 12-21-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WALTER DONALD FRANCIS and NELL FRANCIS,	)	
Plaintiffs,	)	
v.	)	No. 92-C-735-E
AMERICAN AIRLINES, INC.,	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 21 day of Dec., 1993, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ JAMES O. ELLISON

United States District Judge

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ENTERED ON DOCKET

DATE 12-21-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CIMARRON FEDERAL SAVINGS ASSOCIATION, by and through its Receiver, Resolution Trust Corporation, as Successor in Interest to certain assets of Cimarron Federal Savings and Loan Association,

Plaintiff,

vs.

STEPHEN W. MILLS, et al.,

Defendants.

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Case No. 93-C-720-E

AGREED ORDER TO REMAND

NOW on this 16th day of Dec., 1993, the above matter comes on before the undersigned Judge of the District Court on the Motion to Remand of Flint Ridge Property Owners Association to remand the above styled case to the District Court of Delaware County, and the Court finds that no objections thereto have been filed and that all parties are in agreement to remand this case to the District Court of Delaware County.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled case be and is hereby remanded to the District Court of Delaware County.

JUDGE OF THE UNITED STATES DISTRICT COURT

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APPROVED:

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